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SUPREME COURT OF THE UNITED STATES

TUAN VAN TRAN, Petitioner-Appellant v. GARY LINDSEY, Respondent-Appellee	Docket #

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner-Appellant
TUAN VAN TRAN

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit court erred in denying Petitioner's Petition for Writ of Habeas Corpus on the grounds that his trial counsel was ineffective for (A) withdrawing a motion to suppress evidence due to a lack of probable cause to arrest him and for (B) failing to file a motion to suppress in and out of court identifications of Petitioner;

2. Whether the Circuit court erred in denying Petitioner's Petition for Writ of Habeas Corpus on the grounds that his trial counsel was ineffective for failing to object to the bringing of the co-defendant while in custody (who was not jointly tried with Tran) into the courtroom for identification;

3. Whether the Circuit court erred in denying Petitioner's Petition for Writ of Habeas Corpus on the grounds that the in court identification of his co-defendant rendered the trial unfair, thereby denying him due process.

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CITATIONS OF THE REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE

The United States Court of Appeals, 9th Circuit opinion and order is found in case number 98-56251.

The United States District Court for the Southern District of California opinion and order is found in case number CV-96-02161-BTM.

BASIS FOR JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES

This appeal is from the Ninth Circuit Court of Appeals decision entered May 16, 2000, which affirmed the district court's denial of Petitioner's writ of habeas corpus. This Court has jurisdiction under 28 U.S.C. §2254.

BASIS FOR JURISDICTION IN THE NINTH CIRCUIT COURT OF APPEALS

The Ninth Circuit Court of Appeals has jurisdiction over appeals from orders denying Petitions for Writ of Habeas Corpus under 28 U.S.C. §2253 and §2254.

CONSTITUTIONAL PROVISIONS INVOLVED

1. In all criminal prosecutions, the accused shall enjoy the right to . . .to have the Assistance off Counsel for his defence. U.S. CONST. amend. VI.
2. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, §1.

STATUTES INVOLVED IN THE CASE

1. 28 U.S.C . §2254(b), as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.

PROCEEDINGS AND DISPOSITION IN THE STATE COURT, DISTRICT COURT, AND THE CIRCUIT COURT OF APPEALS

Appellant was charged in an Information the Superior Court of the State of California with violating the following Penal Code sections:

Ct. 1:	Penal Code §187(a) - Murder (2/2/89);
Ct. 2:	PC§211, 212.5 (a) - Robbery of inhabited dwelling (2/2/89);
Ct. 3:	PC§211, 212.5 (a) - Robbery of inhabited dwelling (1/18/89);
Ct. 4:	PC§211, 212.5 (a) - Robbery of inhabited dwelling (2/11/89).
Ct. 5	PC§245(a)(2) - Assault with a firearm (2/11/89)

He entered a plea of not guilty and a jury trial began on June 9, 1989. Petitioner testified at his trial. He was convicted of counts 1-4. He was acquitted on count five.

Appellant was sentenced to 36 years to life on July 5, 1989.

Petitioner appealed from the judgment of conviction in the Court of Appeal, Fourth Appellate District of the State of California (Case number D011037) The verdict was affirmed in a decision on January 23, 1991. Petitioner filed a petition for review in the Supreme Court of the State of California (Case number S019829) which was denied on April 10, 1991.

On September 16, 1993, Petitioner filed a petition for writ of habeas corpus with the United States District Court, Southern District (Civil No. 93-1403K), alleging two grounds:

(1) INEFFECTIVE ASSISTANCE OF COUNSEL due to the failure of counsel to make a motion to suppress both the in-court and out-of-court identifications; and

(2) Petitioner's DUE PROCESS rights were violated when his co-defendant was brought into the courtroom while in custody for identification by the arresting officer.

The District Court found that Petitioner had only partially exhausted his state claims. The court ruled that Petitioner has exhausted his state claim regarding ineffective assistance of counsel due to the failure to make a motion to suppress both the in-court and out-of-court identifications, but found that Petitioner had not exhausted his claim that his due process rights were violated when his co-defendant was brought into court to be identified by the arresting officer. The court dismissed the petition without prejudice on August 11, 1994 for failure to exhaust state remedies.

Petitioner filed a petition for writ of habeas corpus with the California Supreme Court raising the DUE PROCESS issue. The Supreme Court (case number S040479) denied his petition on

October 28, 1994, without granting an evidentiary hearing (exhibit 3).

Petitioner subsequently (on January 6, 1995) refiled a Petition for Writ of Habeas Corpus with the United States District Court, Southern District (Civil No. 95-0018-B(Por) [consolidated case Civil No. 95-0106-B(Por)], presenting two grounds:

(1) INEFFECTIVE ASSISTANCE OF COUNSEL due to the failure of counsel to make a motion to suppress both the in-court and out-of-court identifications; and

(2) INEFFECTIVE ASSISTANCE OF COUNSEL due to trial counsel allowing Petitioner's co-defendant to be brought into court to be identified by the arresting officer.

The District Court again ruled that Petitioner had exhausted his state remedies regarding his first claim, but had not regarding his second claim. The court found that in Petitioner's 1994 petition to the California Supreme Court he had raised the issue of the error of the trial *court* in allowing the co-defendant to be brought into court, but had not raised the issue as then presented in the District Court, i.e., that trial *counsel* erred in allowing the co-defendant to be brought into court. That petition was dismissed without prejudice.

Petitioner filed yet another Petition for a Writ of Habeas Corpus in the Supreme Court of the State of California (No.S049349), alleging trial counsel's ineffective assistance for allowing the co-defendant to be brought into court. That petition was denied on December 20, 1995.

Petitioner filed a Petition for Writ of Habeas Corpus in the U.S. District Court for the Southern District of California on December 18, 1996 on the following grounds:

Ground one: Petitioner was denied effective assistance of counsel by defense counsel's withdrawal of a California Penal Code §1538.5 motion to suppress evidence and by trial counsel's failure to file a common law motion to suppress the out-of-court and in-court identifications of Petitioner.

Ground two: Petitioner was denied effective assistance of counsel by trial counsel's allowing the co-defendant while in custody to be brought into the courtroom for identification by an arresting officer.

Ground three: Petitioner was denied his due process right to a fair trial in violation of the 14th amendment to the United States Constitution when his co-defendant was brought into the courtroom in custody for identification by an arresting officer. The officer's identification of the co-defendant was irrelevant to the issues at Petitioner's trial and presentation of this evidence prejudiced Petitioner and denied him a fair trial.

An Order denying Petitioner's Writ of Habeas Corpus was filed on 4/28/98.

Petitioner filed an appeal with the Ninth Circuit Court of Appeals. On May 16, 2000, the Ninth Circuit Court of Appeals affirmed the district court's decision.

STATEMENT OF FACTS

Petitioner was charged with committing a residential robberies and a murder at three locations in San Diego County. The robbers were viewed by the several victims for various but limited periods of time. The robbers were described as being young Vietnamese men of medium height and build.

Petitioner testified that he was returning home when Tho Tran called his name and asked him for a ride. Tran was friends of Tho's brother, but not Tho.

Petitioner gave Tho a ride to Tho's house.

When they arrived, Petitioner waited outside and saw several police officers walk by his car. After a few minutes, one of them came up and asked for his name and he answered "Tuan Tran" and gave his driver's license. He was removed from the car,

handcuffed, and when the officers wouldn't tell him why he was being arrested, he thought it was because of gambling.

Petitioner consented to a search of his car. A knife was found in Petitioner's car. Petitioner was arrested and placed in custody. A live lineup was conducted thereafter. Twenty people were present at the lineup. Five of the twenty identified Petitioner as one of the robbers.

Petitioner was arraigned in the Superior Court. His counsel prepared and filed a Motion to Suppress Evidence. On the day it was scheduled to be heard, trial counsel went to the court and withdrew the motion

Trial counsel had notice that the live lineup was unduly suggestive from the comment of the Public Defender who was present at the time of the lineup and from her observation as well as from the photograph of the live lineup which she had in her possession. Trial counsel did not bring a motion to suppress the lineup identification and did not bring a motion to suppress the in-court identifications as having been tainted by the suggestive line-up.

A jury trial was conducted and Petitioner was identified as one of the robbers.

Petitioner presented a defense of mistaken identity and proof that he was at a family gathering when the Tran home was robbed and Le shot. Several of Petitioner's relatives testified that during that evening he was with his family celebrating an annual ancestor's ritual holiday.

The knife the officers found belonged to his wife, which she used to peel fruit. (His wife testified that she was pregnant, and had cravings for fruit)

ARGUMENT

I.

THE AEDPA DOES NOT CONTROL THE INSTANT PETITION WHICH WAS ORIGINALLY FILED BEFORE THE EFFECTIVE DATE OF THE ACT.

The Circuit Court of Appeals opinion states that the instant habeas corpus petition is governed by the provisions of 28 U.S.C. § 2254 (d) as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.

However, the AEDPA does not control the instant petition. The AEDPA is not retroactively applied to habeas petitions filed before the Act's effective date of April 24, 1996. (*Jeffries v. Wood* 103 F.3d 827 (9th Cir. 1996.).)

The Circuit Court opinion states that a second petition does not relate back to a first petition where the first petition was dismissed for failure to exhaust state remedies, and therefore AEDPA is applicable. Petitioner asserts this is an error. The original petition was filed in the United States District Court, Southern District on September 16, 1993. At that time, the petition was dismissed without prejudice after the Court determined Petitioner had failed to exhaust state remedies.

The petition was refiled on January 6, 1995, but again the petition was dismissed without prejudice for failure to exhaust state remedies as to Petitioner's second claim. After Petitioner went back to the California Supreme Court which rejected the precise issue raised presently, Petitioner again refiled the instant petition on December 18, 1996.

The original petition was filed three years before the effective date of AEDPA. The court never addressed the issues on the merits and simply dismissed the petition without prejudice for failing to exhaust state remedies. Petitioner's refiling of the same petition after exhausting his state remedies must be considered an amended petition rather than a new petition.

II

TRIAL COUNSEL'S WITHDRAWAL OF THE PENAL CODE SECTION 1538.5 SUPPRESSION MOTION DENIED Petitioner THE EFFECTIVE ASSISTANCE OF COUNSEL.

The police arrested Petitioner on February 11, 1989. The fruits of that arrest were devastating to Petitioner's case. As a result of that arrest the following evidence was found and used against Petitioner: (1) the detention of Petitioner for three days such that he was placed in a live line-up three days later and identified by five victims; (2) a ring which Petitioner was wearing and which was identified as being the product of a robbery; (3) a knife seized from his car; and (4) his fingerprints, which were

compared and found to match some of those found at a victim's home.

At trial, Petitioner presented a sound factual response to each of these pieces of evidence. He challenged (1) the victim's identifications at the lineup by establishing that the lineup was so grossly unfair and suggestive it all but placed a big sign on his chest with the words "pick me" emblazened thereon. Petitioner further presented that the in-court identifications were made under circumstances where the only person the witnesses looked at was Petitioner and each of them had already seen him under the extremely suggestive circumstances of the lineup.

Regarding (2) the ring, Petitioner admitted that he was wearing a ring when he was arrested but that it was similar to, but not the same as, the ring admitted into evidence.

Regarding (3) the knife from his car, Petitioner stated that it belonged to his wife who used it to peal fruit. (Petitioner also established that the knife was never identified as being linked to the case and the knife itself was not admitted into evidence.

Testimony regarding the knife was, however, not stricken from the record.)

Finally (4), as to the fingerprints, Petitioner presented a consistent pattern of police tampering that cast a huge doubt over the legitimacy of the fingerprint and its receipt.

Petitioner asserts that his trial lawyers filing and then withdrawing a challenge to the evidence was error and prejudicial.

The Circuit Court started its analysis by determining if the withdrawal of the motion was prejudicial. The court evaluated whether or not the motion would have been granted had it been pursued. The Circuit court concluded that the motion would have granted, and that the conclusion by the state court that the motion to suppress would have been denied was error. However, the Circuit stated that this was not "clear error" as required under AEDPA and therefore Petition should be denied.

(The District Court's Order asserting that the withdrawal of the motion was a matter of strategy was rejected by the Circuit of Appeals.)

The decision of the Circuit Court is not supported by clear U.S. Supreme Court law on the facts of this case.

The foundation for the officer's "probable cause" is as follows:

1. Petitioner and co-defendant Tho Tran gave inconsistent stories about being together as they arrived at Tho's residence;

2. Petitioner was in a car with an identified robbery suspect the same day a robbery had occurred;

3. Petitioner's first name matched the name heard by a victim at a robbery several days earlier;

4. Petitioner fit the general description of the robber as being young Vietnamese males of medium height and build.
Points one, two, and three ARE in dispute.

Point one: The claim by the officer that Petitioner told him that he had met Tho earlier in the day and had, as a favor to Tho, driven him to his house is not in dispute. But the claim by the officer that Tho had given him a different version of how he had gotten to his apartment IS in dispute. This information was received at only time - at the Preliminary Hearing and it was never challenged or probed. It did not exist on any police report, it was mentioned for the first time at the Preliminary Hearing, almost in

passing, and counsel specifically did NOT use the opportunity of the Preliminary Examination to bring the suppression motion or to challenge the witness.

Petitioner never had the benefit of an attorney who asked the critical questions that needed to be asked: Was Tho's statement given in Vietnamese (the officer doesn't speak Vietnamese)? Had Tho understood the officer's question put to him in English? What were Tho's English skills? Had Tho responded correctly to the officer's question? What did the other witnesses to the officer's question and to Tho's answer say regarding whether the discussion was in Vietnamese or English and whether the officer asked the question clearly and whether Tho responded clearly? (There were at least 16 other witnesses in the house at the time.) What was the manner in which the officer related this information when he testified? Was his credibility attacked by the fact that he had lied to defense counsel and to the district attorney regarding other matters in the discovery? Was his credibility attacked by a showing of distinct bias as manifested by his creation of a line-up which was patently unfair? Did a single judicial officer have the

opportunity to judge the credibility of the police officer who made this statement?

These questions were never presented. These issues were never probed nor tested - not at the Preliminary Hearing, not at a pre-trial motion - because counsel withdrew the motion, and not at the trial where the issue was not litigated. No judge heard this evidence and no judge ruled that this point was in fact established.

Point two: Petitioner does not dispute that he was in a car with an identified robbery suspect on the same day a robbery occurred. But Petitioner does dispute a number of factors regarding this point. First, there is no evidence whatsoever that the officer who arrested Petitioner *knew* that there had been a robbery on the day of Petitioner's arrest (February 11, 1989). The officer arrested Petitioner for his participation in the February 2, 1989 robbery. This matter was never probed and presented to a magistrate to determine exactly what was the state of the knowledge of the police officer. No magistrate ever ruled that there was sufficient cause for the arrest and no magistrate ever made an independent finding of fact regarding this matter.

Petitioner's rights were further abrogated. Because the motion was withdrawn prior to litigation, no magistrate was ever presented with the evidence that the arresting officer knew that there had been a nine day surveillance of Tho, and in that entire nine day surveillance of Tho, neither Petitioner nor Petitioner's car ever crossed the surveillance. The magistrate was never presented with the extensive nature of that surveillance because the motion was withdrawn. The magistrate was never presented with the fact that the police officer knew that the very victims who had identified Tho had not identified Petitioner during photo lineup was not presented.

Point three: Petitioner concedes that the arresting officer believed that the victim of the February 2, 1989 robbery heard one of the other robbers say: "Tuan, turn off the volume." Petitioner contends however, that because his motion was withdrawn it was never presented to a magistrate ruling on the search or to any reviewing judge that the name "Tuan" is the most common of Vietnamese names - the equivalent to the name "John" in English. It was never established that the arresting officer knew that the

name was very common and it was never established how very common the name "Tuan" is. The three state appellate justices acknowledge the significance of the commonality of the name and further acknowledge that this point must therefore be diluted to some degree, but since they were never presented with a factual basis to decide how very common the name is they did not know how fully they should dilute this point.

It should be noted that the failure of Petitioner's counsel to factually establish how common the name is was a point which the prosecutor raised in his Points and Authorities in Opposition to Petitioner's withdrawn Motion to Suppress evidence **Factual conclusion:** In essence, the only facts establishing that the officer had probable cause to arrest Petitioner is (1) that Petitioner gave a truthful statement to the officer that he drove Tho to his house; (2) that this was done nine days after the robbery for which Petitioner was arrested and that this was the only time that Petitioner had been in the presence of Tho during the many days of police surveillance of him; (3) that Petitioner and the robber share (perhaps) the most common Vietnamese name which may

represent a huge percentage (50%?; 33 1/3%?) of the male Vietnamese population and (4) Petitioner fit the general description of the robber in that he was a young Vietnamese male of medium height and build.

The Law: "Probable cause by association" is specifically forbidden as sufficient grounds for arrest and search. *U.S. v. Hillison,* 733 F.2d 692 (9th Cir. 1984); *U.S. v. Robertson* 833 F.2d 777 (9th Cir. 1987).

The fact that Petitioner generally fit the description of the assailant doesn't provide probable cause. (*U.S. v. Ricardo D*, 912 F.2d 337 (9th Cir. 1990). Whereas, the above factors might justify a detention, *(Terry v. Ohio* [1968] 392 U.S. 1; 20 L.Ed.2d 889, 88 S.Ct. 1869), the extension of the detention into the type of circumstances herein are not justified. The scope of a detention is limited. "In the name of investigating a person who is no more than suspected of criminal activity, the police may not . . . . seek to verify their suspicions by means that approach the conditions of arrest." *Florida v. Royer* (1983) 460 U.S. 491, 499 [75 L.Ed.2d 229, 103 S.Ct. 1319].

Any claim that even if the arrest was illegal, the subsequent identifications and fingerprint evidence would not have been suppressed because they were purged of the taint of the illegal arrest should be rejected.

First, Petitioner's presence in the lineup was the direct result of his arrest. Petitioner was taken into custody on February 11th and held until he appeared in a lineup on February 14th. There is no explanation as to how the police would have lawfully secured Petitioner's presence in that lineup independent of the February 11th arrest. Police may not, without probable cause, transport a suspect to the police station for purposes of photographing the defendant (*United States v. Crews* [1979] 445 U.S. 463, 63 L.Ed.2d 537, 100 S.Ct. 1244) or placing him in a line-up. (*Hayes v. Florida*, supra at 816.)

Second, the fingerprints taken from Petitioner at the time of this arrest were compared to those found at the scene of the February 2 robbery and shooting. In fact, respondent acknowledges that "[a]s a result of the fingerprinting, officers were able to find Petitioner's fingerprints on [several pieces of

evidence], all located inside the 4106 Polk Avenue house where the February 2 robbery and murder took place."

Thus, under respondent's own statement of facts, there was no intervening act to purge the fingerprint identification from the illegal arrest. Police may not, without probable cause, transport a suspect to the police station for purposes of obtaining fingerprints (*Hayes v. Florida* [1985] 470 U.S. 811, 84 L.Ed.2d 705, 205 S.Ct. 1643; *Davis v. Mississippi* [1969] 394 U.S. 721, 22 L.Ed.2d 676, 89 S.Ct. 1394).

Third, the seizure of the knife from Petitioner's car cannot be said to be purged of the taint of the illegal arrest simply because Petitioner consented to the search. (*Florida v. Royer* (1983) 460 U.S. 491, 501-508 [75 L.Ed. 229, 103 S.Ct. 1319].) Petitioner's consent immediately followed his arrest, and thus was a direct result of the unlawful arrest. (*United States v. Delgadillo-Velasquez* 856 F.2d 1292, 1299-1300 (9th Cir. 1988) [consent not sufficiently attenuated when obtained within minutes of illegal arrest]; *United States v. Ceballos* 812 F.2d 42, 49-50 (2d Cir. 1987.)

Moreover, the in-court identifications were also subject to suppression, unless the People were able to establish that they were not tainted by the prior illegal detention and subsequent lineup identification. *United States v. Crews*, supra, 445 U.S. at pp 572-473.

Conclusion: Petitioner *did* fit the general description of the robbers, in that he was between 5 feet and 5 ft 5 inches tall, Vietnamese, and between the ages of sixteen and twenty. We shouldn't check our common sense at the court house entrance - thousands of Vietnamese residents in San Diego fit this description (it might be postulated that the only ones in the community who didn't were in the lineup used in this case).

The facts which the officer knew at the time they initiated the search did not provide probable cause for their conduct and a motion attacking that search would have been granted.

Claude Rains' words to his sergeant in the presence of Humphrey Bogart: "Round up the usual suspects", may have been acceptable justification for police conduct in *Casablanca*, it is not acceptable in the case at bar.

III.

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF TRIAL COUNSEL'S FAILURE TO FILE A COMMON LAW MOTION TO SUPPRESS THE SUGGESTIVE LINEUP AND THE RESULTING OUT-OF-COURT AND IN-COURT IDENTIFICATIONS.

Perhaps no where else throughout the entire criminal justice system is there a more dangerously unreliable witness than one who states categorically that her eyewitness identification is correct. Yet, at the same time, perhaps no where throughout our justice system is there a more persuasive witness.

It is that combination of manifest unreliability wrapped in a cloak of apparent accuracy that explains why so many cases of eyewitness identification have been shown to result in the conviction of the wrong person. It undoubtedly was this history which motivated Justice Felix Frankfurter to issue the words:

> "The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials."
> *United States v. Wade.*

There is truly no dispute in this case that the only contested issue was the identification of the perpetrator. The District Attorney so acknowledged this in his closing statement and the very first thing that the District Attorney pointed to in arguing that Petitioner was the perpetrator was the eyewitness identification of the witnesses. Defense counsel also focused on this issue, discussing at length the eyewitness identification and the lineup. There is also no dispute that the in-court identifications only came about after each of the witnesses attended that fateful lineup on February 15, 1989, where Petitioner was so obviously highlighted.

Yet despite that history, and despite the fact that trial counsel was fully informed that the line-up in this case was fatally flawed, and further despite the fact that trial counsel actually prepared and wrote a motion to challenge the line-up identifications in this case, trial counsel inexplicably never filed the motion, and never sought to challenge the suggestibility of the lineup.

Richard Pryor used to do a stand-up routine where he mocked the fairness of a live line-up conducted by police who were anxious to get a conviction of a suspect. He used to joke that

when a "brother" stood in a line-up, he stood right in the middle of a "refrigerator, a nun, and a goose", and it was little wonder that he always seemed to get picked out. Pryor should have been talking about this line-up.

Person number 1, 5, and 6 are twice as old as the eighteen year old Petitioner and twice as old as the 18-20 age range of the suspect. Person number 2 has a mustache - where the assailant did not; person number 3 looks like a sumo wrestler, and is hardly a medium to thin build. On top of that, it is only Petitioner whose hair is not balding or very closely cut or in anyway matches the description of the assailant.

It is little wonder that the line-up was so flawed as the Detective in charge stated that he created the line-up without any consideration to the age of the persons and without consideration as to whether the participants were clean shaven (as described by the witnesses) or had facial hair.

In addition to the memo, trial counsel was aware that a number of factors present in the trial made the eyewitness identifications extremely suspect, including:

1. Witness Nachampasak went to the line-up with the *expectation* to pick someone out because police had told her that they had arrested someone and she would see them at the line-up;
2. Witness Nachampasak knew that her assailant was Vietnamese, believed only two of the line-up participants were Vietnamese;
3. Witness Nachampasak's ability to observe clearly and recall clearly were impacted by the fact that she was fearful during the robbery because of the presence of weapons and the danger to her family:"I was so scared, I was shaking that day".
4. Her total observational period was 10 minutes, split amongst three assailants, and a fixation of looking at the guns that the assailants had.
5. She saw Petitioner alone at the Preliminary Examination.
6. Tuan Ahn Tran did not identify Petitioner at the line-up
7. Loan Kim Do was very frightened and spent time looking at the weapons;
8. Loan Kim Do went to the line-up with the expectation of seeing someone that the police had arrested;
9. She saw Petitioner alone at the Preliminary Examination.
10. Von Hong Nguyen saw the robber only twice for a moment each
11. Von Hong Nguyen was fearful of a the gun involved
12. Von Hong Nguyen was mistaken as to the nationality of the men
13. Nhan Nguyen was sleeping when first made observation
14. Nhan Nguyen's went to the line-up believing that police had arrested some people

15. Nhan Nguyen's observational period was 6 seconds

The Circuit Court concluded that the state court's denial of this issue was not clear error. This conclusion is not supported by the facts herein.

In order to be fair, a line-up should contain people with as many similarities as possible, such that the results won't be "suggested" by the fact that the "prime suspect" stands out in that he is the only one of his age, the only one of his weight, the only one of his facial hair, the only one of his body build, the only one who fits the description. It is absolutely manifest that Petitioner standing in position number 3 is not one of six people who might have fit the description of the robbers; he is not one of five or four or three or two - he is one of one. He might as well have been standing in the line-up alone.

IV.

ALLOWING THE IN-COURT IDENTIFICATION OF ACCOMPLICE THO TRAN VIOLATED PETITIONER'S DUE PROCESS RIGHTS AND TRIAL COUNSEL'S FAILURE TO STOP THE PREJUDICIAL PROCEDURE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

The Circuit Court found that the trial court decision of allowing the accomplice Tho Tran to be brought into the courtroom for Officer Larmour to identify as the person who arrived at the house during the search and was arrested was harmless. This conclusion is in error.

The defense strategy to present a scenario whereby the police, having found Tran in Tho's company, were unable to resist the temptation to arrest him even though they had no solid evidence against him, in the hopes they would be able to build a case after the arrest was ineffective. Since there was no dispute Tho was the person arrested with Tran, there was no need for the officer to identify Tho to the jury. The evidence was irrelevant and should not have been admitted.

Trial counsel's failure to keep the improper identification procedure from the jury must be held to be incompetent.

The error denied Petitioner his federal constitutional right to a fair trial. As such, his conviction must be reversed unless the prosecution can show that Tho's appearance at Petitioner's trial was harmless beyond a reasonable doubt. (*Rose v. Clark* (1986) 478 U.S. 570 [92 L.Ed.2d 460, 106 S.Ct. 3101].)

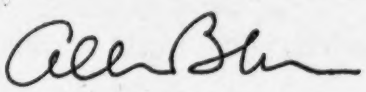
Petitioner presented a strong alibi defense to the charges. He and several of his family members and friends testified that he was home on the evening of February 2, 1989 celebrating a Vietnamese holiday. Defense counsel argued that Petitioner was never a suspect in the case and that the case against him was built after his arrest. As stated above, the jurors were aware that several of the witnesses had identified Tho from a lineup. Under these circumstances, Tho's appearance during trial very likely affected the jury's evaluation of the credibility of the identifications of the witnesses and Petitioner's defense. Thus, it cannot be said that Tho's appearance at Petitioner's trial was harmless beyond a reasonable doubt.

The errors by the trial court and trial counsel in permitting the in-court identification were prejudicial and require reversal of Petitioner's convictions.

CONCLUSION

For all of the above reasons, appellant requests that this Court reverse the district court's denial of his Petition for Writ of Habeas Corpus.

DATED: August 11, 2000 RESPECTFULLY SUBMITTED,



ALLEN BLOOM
ATTORNEY AT LAW

PROOF OF SERVICE

CASE NAME: *TUAN VAN TRAN V. GARY LINDSEY, WARDEN*
CASE NO.:

I DECLARE:

I am citizen of the United States and a resident of the County of San Diego, State of California. am over the age of 18 and not a party to the within action. My business address is 1551 Fourth Avenue, #801, San Diego, California 92101-3156.

On AUGUST 11, 2000 I served the foregoing document described as:

PETITION FOR WRIT OF CERTIORARI

by placing the original and 40 copies to

UNITED STATES SUPREME COURT
1 FIRST STREET, N.E.
WASHINGTON, D.C. 20543

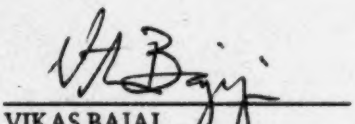
and 3 copies thereof in a separate envelope for each addressee named hereafter, and sealing each envelope and, with the postage thereon fully prepaid, depositing each in the United States mail at San Diego, California. Each enveloped was addressed to each such addressee respectively as follows:

ATTORNEY GENERAL OF STATE OF CALIFORNIA
Garrett Beaumont
Supervising Deputy Attorney General
P.O. Box 85266
San Diego, California 92186-5266

and one copy to
Mr. Tuan Van Tran, E-31757
Salinas Valley State Prison
D-3-127-Low
P.O. Box 1050
Soledad, Cal. 93960-1050

Executed on August 11, 2000 at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



VIKAS BAJAJ

(2) Supreme Court, U.S.
FILED

00-255 AUG 11 2000

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

TUAN VAN TRAN, Petitioner-Appellant v. GARY LINDSEY, Respondent-Appellee	Docket #

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX
EXCERPTS OF RECORD

Allen Bloom
State Bar No. 65235
1551 Fourth Avenue, #801
San Diego, CA 92101
(619) 235-0508

Attorney for Petitioner-Appellant
TUAN VAN TRAN

95pp

SUPREME COURT OF THE UNITED STATES

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TRAN v. LINDSEY, No 98-56251 (9TH Cir. May 16, 2000) 46

Filed April 13, 1989

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,

sc- No.CR103118

Plaintiff, DA No.

B048545

v.

TUAN VAN TRAN,

Defendant: (s)

INFORMATION

SUMMARY

Ct. No.	Charge	Sentence Range	Defendant	Special Allegation	All.Effect
1	PC187(a)	25-Life	Tran, Tuan Van	PC12022.5	+2
2	PC211	3-4-6	Tran, Tuan Van	PC212.5(a) PC12022.5	Check +2
3	PC211	3-4-6	Tran, Tuan Van	PC212.5(a) PC12022.5	Check +2
4	PC211	3-4-6	Tran, Tuan Van	PC 212.5(a)	Check

		PC12022.5	+2
5	PC245(a)(2)2-3-4	Tran, Tuan Van PC12022.5	+2
		PC12022.7	+3

The District Attorney of the County of San Diego, State of Caiifornia,

accuses the Defendant(s) of committing, in the County of San Diego, State

of California, the following crime(s):

COUNT-1 MURDER

On or about February 2, 1989 TUAN VAN TRAN did willfully, unlawfully

murder HUY TINH LE, a human being, in violation ot PENAL CODE SECTION 187.

And, it is further alleged that in the commission and attempted commission of the above oftense, the said detendant, TUAN VAN TRAN, personally used a firearm, to wit: a pistol, within the meaning of Penal Code section 12022.5(a).

COUNT-2 ROBBERY (FIRST DEGREE)

On or about February 2, 1989, TUAN VAN TRAN did willfully, unlawfully and by means of force and fear take personal property from the person, possession, and immediate presence of LOAN

KIM DO, in violation of PENAL CODE SECTION 211.

And, it is further alleged that the above offense was perpetrated in an inhabited dwelling house, making the offense Robbery in the first degree, within the meaning of Penal Code section 212.5(a).

And, it is further alleged that in the commission and attempted commission of the above offense, the said defendant, TUAN VAN TRAN, personally used a firearm, to wit: a pistol, within the meaning of Penal Code section 12022.5(a)

COUNT-3 ROBBERY (FIRST DEGREE)

On or about January 18, 1989, TUAN VAN TRAN did willfully, unlawfully and by means of force and fear take personal property from the person, possession, and immediate presence of BANGBAY NACHAMPASAK, in violation of PENAL CODE SECTION 211.

And, it is further alleged that the above offense was perpetrated in an inhabited dwelling house, making the offense Robbery in the first degree, within the meaning of Penal Code section 212.5(a).

And, it is further alleged that in the commission and attempted commission of the above offense, the said defendant, TUAN VAN TRAN, personally used a firearm, to wit: a pistol, within the meaning of Penal Code section 12022.5(a)

COUNT-4 ROBBERY (FIRST DEGREE)

On or about February 11, 1989, TUAN VAN TRAN did willfully, unlawfully and by means of force and fear take personal property from the person, possession, and immediate presence of VAN HANG NGUYEN, in violation of PENAL CODE SECTION 211.

And, it is further alleged that the above offense was perpetrated in an inhabited dwelling house, making the offense Robbery in the first degree, within the meaning of Penal Code section 212.5(a).

And, it is further alleged that in the commission and attempted commission of the above offense, the said defendant, TUAN VAN TRAN, personally used a firearm, to wit: a pistol, within the meaning of Penal Code section 12022.5(a)

COUNT-5 ASSAULT WITH A FIREARM

On or about February 13, 1989 TUAN VAN TRAN did willfully and unlawtullY commit an assault on another with a tirearm, in violation of PENAL CODE SECTION 245(a)(2).

And, it is further alleged that in the commission and attempted commission of the above otfense, the said defendant, TUAN VAN TRAN, personally used a firearm, to wit: a pistoL, within the meaning of Penal Code section 12022.5 (a) .

And, it is further alleged that in the commission and attempted

commission of the above offense, the said def'endant, TUAN VAN TRAN, with tne intent to inflict such injury, personally inflicted great bodily injury upon VAN HANG NGUYEN, not an accomplice to the above offense, within the meaning of Penal Code section 12022.7.

THIS INFORMATION IS NUMBERED CR103118

,CONSISTS OF

5 COUNT(S).

EDWIN L. MILLER, JR.

DISTRICT ATTORNEY

County of San Diego,

State of California

Dated 04/12/1989 By: Richard J. Neely

FILED SEPT. 19, 1995

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TUAN VAN TRAN, Civil No. 95-0018-'B(POR)

(Consolidated Case

Plaintiff, Civil No. 95-0106-B(POR)

v.

ORDER REGARDING FAILURE

TO EXHAUST STATE

REMEDIES

K..W. PRUNTY, Warden,

Respondent.

Petitioner, Tuan Van Tran, a state prisoner proceeding pro se,

has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 (1988).

PROCEDURAL BACKGROUND

July 5, 1989, after a jury trial, petitioner was convicted in the San Diego Superior Court of one count of first degree murder, a violation of California Penal Code section 187(a), and three counts of residential robbery, a violation of California Penal Code sections 211 and 212.5(a). In addition, the jury found that petitioner was personally armed with a firearm as alleged in three of the four counts. Petitioner was sentenced to a term of thirty-six years and four months to life imprisonment.

Petitioner appealed his judgment to the California Court of Appeal. In an unpublished decision f iled January 23, 1991, the court affirmed the judgment but struck the gun use enhancement to the f irst degree murder conviction as well as the order that petitioner pay $20, 000 in restitution. Petitioner filed a petition for review to the California Supreme Court. That petition was denied on April 10, 1991.

Petitioner then filed a petition for writ of habeas corpus with the United States District Court. The petition was dismissed on August 11, 1994 for failure to exhaust state remedies. Petitioner subsequently filed a petition for writ of habeas corpus with the California supreme Court. The Court denied his petition on October 28, 1994.

DISCUSSION

In petitioner's current consolidated application, petitioner purports to have exhausted his state remedies as to all claims. However, af ter a careful review of the Petition, Return, Traverse and all supporting documents, the Court finds that petitioner has f ailed to exhaust his state remedies as to Ground Two of the Petition (Civil No. 95-0106-B(POR)].

A. Exhaustion Requirement

The exhaustion of available state remedies is a prerequisite to a federal court's consideration of claims sought to be presented in habeas corpus proceedings. Rose v. Lundy, 455 U.S.

28 509, 522, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982). A federal court shall not grant a writ of habeas corpus "unless it appears that the applicant has exhausted the remedies available in the court of the State . . . 11 28 U.S.C. § 2254(b)(1988).

A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider all claims before presenting them to the federal court. Picard v. Connor, 276, 92 S.Ct 509 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

Petitioner must "fairly present" federal claims to the state courts in order to give the State the opportunity to pass upon and

correct alleged violations of its prisoners' federal rights. Duncan v. Henry U.S. _ , 115 S. Ct 887, 888 (1995) (citing Picard, 404 U.S. at 275]. "If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.', Id.

1. Ineffective Assistance of Counsel Claim

ln his application for a writ of habeas corpus before this court, petitioner contends that his trial counsel provided him with ineffective assistance. Specifically, peitioner alleges that counsel's representation was constitutionally ineffective due to her failure to file a motion to supress both the in-court and out-of-court identifications of petitioner. Petitioner also alleges that counsel was ineffective because she failed to object to the in-court identification of his co-defendant.

In his claim to the Californa Supreme Court, petitioner failed to raise the latter claim. Petitioner instead raised the claim that he was denied his due prcess right to a fair trial based on the in-court identification of his co-defendant.

Comparing the claim raised in the state court to that now presented to this federal court, it is evident that the claims are different. The state court claim alleged an error of the trial court

while the federal claim alleges an error by trial **counsel**. The claims are distinct from one another and do not meet the exhaustion of state remedies requirement.
Although petitioner's ineffective assistance of counsel claim is based on the same factual scenario as referred to in his habeas petition to the California Supreme Court, petitioner has presented the facts in support of a wholly different constitutional claim.

To meet the exhaustion requirement the "substance" of petitioner's federal habeas corpus claim must be "fairly presented", to the state courts. Anderson v. Harless, 459 U.S. 4, 103 S. Ct. 276 (1982). A description of the same operative facts in support of a violation of a different claim does not meet the Supreme Court's "fairly presented" requirement under the holding of Anderson, "It is not enough that all the facts necessary to support the federal claim were before the state courts." Anderson,
459 U.S. at 5, 7. In such a situation, the state court is not provided with a 'If air opportunity" to apply controlling legal principles to the facts bearing upon petitioner's constitutional claim. Id. at 6.
Thus,Petitioner's claim in Ground Two of his current federal petition has never been presented to or considered by the California Supreme Court.

2. Mixed Petition - Exhausted and Unexhausted Claims

When presented with an application for a writ of habeas corpus which presents both exhausted and unexhausted claims, the Ninth Circuit has stated that a federal district court must dismiss the petition. Rose, 455 U.S. at 522; O'Bremski v. Maass, 915 F.2d 418, 421 (9th Cir. 1990), cert. denied, 498 U.S. 1096 (1991). The court cannot address the merits of the exhausted claims and simply ignore the unexhausted claims. Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988), cert. denied, 498 U.S. 1093 (1991). Dismissal of the petition is dictated by the doctrine of comity. Rose, 455 U.S. at 518.

Comity dictates that one court should refrain from action on causes properly within

its jurisdiction until the courts of another sovereignty with concurrent

powers, and already cognizant of the litigation, have had an opportunity to pass on the matter. Id..[citing Darr v. Burford, 339 U.S. 200, 204 (1950)]. As such, the exhaustion of state remedies is required to uphold "the state courts' role in the enforcement of federal law and (to] prevent (the] disruption of state judicial proceedings." Rose, 455 U.S. at 518.

CONCLUSION AND RECOMMENDATION

A federal district court must dismiss a petition f or a writ of habeas corpus if it contains claims as to which state remedies have

not been exhausted. Rose, 455 U.S. at 522. Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be dismissed without prejudice for failure to exhaust state remedies. See Rule 4, 28 U.S.C. foll. § 2254 (1988). This report and recommendation is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(1988). IT IS ORDERED THAT no later than October 20, 1995, any party may file written objections with the court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation." IT IS FURTHER ORDERED THAT any reply to the objections shall be filed with the court and served on all parties no later than November 3, 1995. The parties are advised that failure to file objections

within the specified time may waive the right to appeal this court's order. Martineg v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: Sept 18, 1995 LOUISA S. PORTE

United States Magistrate Judge

Copies to: JUDGE BREWSTER

TUAN VAN TRAN

CDC NO. E 31757

CALIPATRIA STATE PRISON

P 0 BOX 5002

CALIPATRIA CA 92233 5002

GARRETT BEAUMONT

SUPERVISING DEPUTY ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL

P 0 BOX 85266

SAN DIEGO CA 92186 5266

SUPREME COURT

FI LED

DEC 20 1995

ORDER DENYING WRIT OF HABEAS CORPUS

No-9049349

IN THE SUPREME COURT OF CALIFORNIA

IN RE TUAN VAN TRAN

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

Chief Justice

ORDER DENYING WRIT OF HABEAS CORPUS

No. S040479

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE TUAN VAN TRAN

FILED ON OCT 2 8 1994

HABEAS CORPUS

Petition for writ of habeas corpus DENIED. (See In re Waltreus (1965) 62 Cal.2d 218, 225.)

Chief Justice

Fourth Appellate District- Division One, No. D011037

SO19829

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

FILED APR

10-1991

v.

TUAN VAN TRAN, Appellant

Appellant's petition for review DENIED.

LUCAS

Chief Justice

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FILED JULY 3, 1997

TUAN VAN TRAN,

Civil No. 96-2161-BTM(LSP)

Petitioner,

REPORT AND RECOMMENDATION

vs. RE DENIAL OF PETITION

GARY LINDSEY, Warden

Respondent

Petitioner, a state prisoner, through his attorney, Allen R-Bloom, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the Court recommends that the petition be denied.

I. BACKGROUND

Petitioner was arrested on February 11, 1989, by San Diego police officers who were investigating a series of residential robberies. Rep-Tr.at385. During a robbery which occurred on February 2,1989, Huis Tinh Le was shot and killed by the assailants. Rep.Tr.at76-79,149-52, 224-27. Tho Tran was

identified as one of the robbers. Rep. Tr. at 380-85, 387. On February 11, 1989, while the police were executing a search warrant of Tho's brother's residence, Tho and Petitioner arrived. Both were arrested. Rep. Tr. at 382-85.

At the time of Petitioner's arrest, the police had information that his name had been used on February 2, 1989, and that Petitioner fit the general description of the robbery suspects. Rep.Tr. At 73, 383-85, 392-93.

When arrested, Petitioner was wearing a gold ring which was later identified as having been taken during a January 18, 1989, robbery. Rep. Tr. at 411-14. In addition, Petitioner's fingerprints matched prints found at the scene of the February 2, 1989 robbery and shooting. Rep. Tr. at 229-43, 267-76, 279-93, 719-21. On February 14, 1989, the police conducted a lineup *at which* victims of the *January 18, 1989, and* Febmary 11, 1989, robberies identified Petitioner. Rep.Tr.at 388,485-86,627,641,644.

On July 5, 19 89, a San Diego Superior Court jury found Petitioner guilty of one count of first degree murder and three counts of residential robbery. Clerk's Tr. at 150-58. Petitioner was sentenced to a term of twenty-seven years to life with a nine-year, four-month enhancement for use of a firearm. Clerk's Tr. at 121, 161. In an unpublished opinion filed on January 23, 1991, the California Court of Appeal affirmed the judgment but struck the sentencing enhancement and $20,000 restitution

order, and remanded the cast for imposition of a retitution amount within the S10,000 statutory maximum People v. Tran, Case No. D011037, slip op. at 17-19 (Cal. Ct. App. 4th Dist. Div. I Jan. 23, 1991). The California Supreme Court denied Petitioner's petition for review on April 10, 1991. Petitioner filed several subsequent petitions for writ ofhabeas corpus in both state and federal court, which were denied. One petition was filed in this District on September 16, 1993, and was dismissed for failure to exhaust state remedies. Another petition was filed on January 6, 1995, and also was dismissed for failure to exhaust state remedies. The current petition was filed on December 18, 1996.

Having now exhausted his state court remedies, Petitioner filed the current petition alleging: (1) that he was denied effective assistance of counsel by (a) defense counsel's withdrawal of a motion to suppress lineup identifications and fingerprints taken after arrest, and (b) defense counsel's failure to suppress an allegedly suggestive lineup and resulting out-of-court and in-court identifications; and (2) that he was denied his due process rights under the Fourteenth Amendment ofthe United States Constitution when his codefendant was brought into the courtroom for *identification by* an arresting officer.

II. SCOPE OF REVIEW

The Petition in this case was filed an December 18, 1996. On April 24, 1996, while this case was pending, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (Act), Pub. L. No. 104-132, 110 Stat. 1214. In Lindh v. Mumby, No. 96-6298,1997 WL 338568 (U.S. June 23, 1997), the Supreme Court held "that the new provisions of chapter 153 [ofTitle 28 of the United States Code contained in Title I of the Antiterrorism and Effective Death Penalty Act (AEDPA)] generally apply only to cases filed after the [AEDPA] became effective." Id. at *8.

Petitioner claims that the provisions of 29 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), do not apply to his current Petition because it is really an amendment to the petition filed in Case No. 96-0189-K (CGA), which was filed well before the effective date of the AEDPA. Since the merits of the Petition in Case No. 96-0198-K (CGA) were not adjudicated, Petitioner claims that the refiling of the same petition after exhausting state remedies must be considered an amendment to the original petition. According to Petitioner, the filing date of this Petition should be the date of the original petition that was dismissed for failure to exhaust state remedies.

The AEDPA provides that "[a] 1 -year period of limitation

shall apply for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court" and that "[t]he time during which a properly filed application for State post-conviction or other collateml review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C.A. § 2244(d)(1) & (2) (West Supp. 1997). Thus, the one year statute of limitation for filing a habeas corpus petition is tolled while Petitioner exhausts his state remedies. It follows that the tolling provisions under the A.EDPA would be unnecessary if the court allowed the filing of subsequent petitions-that have been refiled after exhausting state court remedies-to relate back to the original Ming date of the first petition. There is no support for Petitioner's attempt to have the filing date of the instant Petition relate back to the filing of a petition in a previous case that was dismissed for failure to exhaust statejudicial remedies.

In addition, the Ninth Circuit recently discussed the exhaustion requirement in deciding whether the district court had erred in dismissing a petition because it contained an unexhausted claim. Greenawalt v. Stewart 105 F.3d 1268 (9th Cir.), cert.denied 117 S. Ct. 794 (1997). The court noted that the exhaustion requirement is adhered to "'even though Congress and the Supreme Court periodically modify the rules governing the availability of habeas corpus relief in federal court" and even

when "the Act may have worsened (Petitioner's] legal position while he was exhausting his state remedies . . ." Id. at 1275. Accordingly, this Court concludes that a petition that was dismissed for failure to exhaust and is later refiled under a new case number after exhaustion of state remedies, cannot be considered an amended petition simply because there have been modifications to rules while the petitioner has been exhausting state judicial remedies.

As noted above, the instant Petition was filed on December 18, 1996. In Lindh v.Murphy No. 96-6298, 1997 WL 338568 (U.S. J=e 23, 1997), the Supreme Court held "that the new provisions of chapter 153 [of Title 28 of the United States Code contained in Title I of the Antiterrorism and Effective Death Penalty Act (AEDPA)] generally apply only to cases filed after the [AEDPA) became effective," LL at *8. Since the Petition was filed after April 24,1996, the effective date of the AEDPA, its provisions apply to this case. Hence, statutory references are to the provisions governing federal habeas corpus as they exist after April 24, 1996.

Under 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for writ of habeas corpus "shall not be granted ... unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of established Federal law, as determined by the Supreme Court of the United

States; or (2) resulted in a decision that was based on an unreasonable deten-nination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. 2254(d)(1) & (2) (West Supp. 1997). This standard applies to this case.

III. DISCUSSION

A. Ineffective Assistance of Counsel

Petitioner claims he was denied effective assistance of counsel in two ways: (1) that his trial counsel negligently withdrew a motion to suppress lineup identifications and fingerprints obtained after arrcst~ and (2) that counsel negligently failed to move to suppress allegedly suggestive lineup identifications.

The determination of Petitioner's claims of ineffective assistance of counsel turns on the application of clearly established federal law as determined by the U.S. Supreme Court. 28 U.S.C.A. § 2254(d)(1) (West Supp. 1997). The Supreme Court's decision in Strickland v.Washington, 466 U.S. 668 (1984), constitutes the clearly established law the Court follws when reviewing claims of ineffective assistance of counsel. Baylor v. Estelle, 94 F.3d 1321, 1323
12 (9th Cir. 1996), cert. denied, 117 S. Ct. 1329 (1997). The standard for reviewing a claim of ineffective assistance of counsel is set forth in Strickland. First, the defendant must show that

counsel's performance was deficient. This requires showing that counsel made error so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant ***must show*** that the deficient performance prejudiced *the* defense. This requires showing that counsel's errors were so serious they deprived the defendant of a fair trial, i.e., a trial whose result is reliable. Id.. at 687.

In making the second showing, defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different A reasonable probability is a probability sufficient to undermine confidence in the outcome."' 11 at 694. The court "need not determine, *whether* counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," because Petitioner must,establish *both* deficient performance and prejudice before he is entitled to relief. Id. at 697.

I. Counsel's withdrawal of motion to suppress

Defense counsel filed a pretrial motion pursuant to California Penal Code section 1538.5 to suppress lineup identifications and fingerprints obtained after arrest on the ground that there was insufficient probable cause to arrest Petitioner Clerk'sTr.at3-10. Counsel later withdrew the pretrial motion, however. Clerk's Tr. at 125.

At trial, during a sidebar ***conference on*** the record and after an attempt by defense counsel to show the jury that the arresting officer lacked probable cause to arrest, the trial court admonished counsel that "the remedy that you have is, number one, to have filed some kind of motion pretrial to attack it, to show that he was arrested without probable cause:' Counsel responded that I made a tactical decision not to do that:' Rep. Tr. at 363. There was no additional explanation given for defense counsel's withdrawal of the pretrial motion.

Petitioner asserts that counsel's withdrawal of her motion was unreasonable. Counsel's strategic decision not to litigate the motion may have been based on the premise that the Petitioner may lose more by pursuing it than he would have g6ned. The "proposition that 'a defendant has everything to gain and nothing to lose in filing a motion to suppress"'was rejected by the Ninth Circuit where the motion is meritless. Lowry v. Lewis. 21 F.3d 344, 346 (9th Cir.1994) (citing United States v. Molina, 934 F.2d

1440, 1447 (9th Cir. 199 1)). The defendant "stands to lose two things ofvalue-a significant quantity of his lawyer's scarce time, and some
19 of his lawyees crediibility with the judge." Id. at 346. It is not unreasonable to decide to spend valuable time on trial preparation instead of litigating a pretrial motion. Moreover, it is reasonable to decide to avoid the risk of losing credibility with the Ju4ge by litigating a meritless motion.

Because Petitioner has failed to show prejudice, the Court disposes of Petitionces claim that his trial attorney was ineffective for failing to move to suppress lineup identifications and fingerprints. Strickland, 668 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground oflack ofsufficient prejudice, which we expect will often be so, that course should be followed.'I. Specifically, Petitioner has failed to show counsel's withdrawal of the motion to suppress would have produced a different result at trial. Under the second prong of
the Strickland test, Petitioner "must show that there is a reasonable probability that~ but for counsel's unprofessional errors, the result of the proceeding would have been different" Id., 466 U.S. at 694. In addition, "[w]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his [or her]

Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." Kirnmelman y. Morrison, 477 U.S. 365, 375 (1986). Thus,Petitioner must show that the suppression motion would have been grantr4 and that the verdict would have been different.

Along with suppression of the lineup identifications and fingerprints obtaffied from Petitioner after arrest, Petitioner claims the following additional items would also have been suppressed as fruit of the unlawful arrest had the motion been granted:- fingerprints on a manila envelope, a Christmas card envelope, and a bedroom dresser drawer, all found where the murder occurred; a ring that belonged to one of the victims found on the Petitioner at the time of his arrest and a kitchen knife found in Petitioner's vehicle. Rep. Tr. at 229-43, 267-76, 279-93, 16 404-05, 411-14, 609-10, 719-21. Absent these items, Petitioner asserts that them would be no evidence available from which the jury could reasonably infer guilt.

In order to prevail on his claim, Petitioner must first show that the motion to suppress would have been granted. Ld. Respondent asserts that trial counsel's decision was not unreasonable because the opposition filed by the prosecution clearly showed there was probable cause for the arrest, thus the motion was meritless. The appellate court concluded, in its

opinion denying the ineffective assistance of counsel claim filed on January 23, 1991, that there was sufficient probable cause to arrest Petitioner, and therefore, the motion would have been fruitless to pursue. The Court based its conclusion on the fact that (1) Petitioner and his co-defendant, Tho Tran, gave inconsistent stories about being together as they arrived at Tho's residence, (2) Petitioner was in a car with an identified robbery suspect on the same day a robbery occurred, (3) Petitioner's first name matched the name heard by a victim at a robbery several days earlier, and (4) Petitioner fit the general description of the robbers. People v. Tran, Case No. DO11037, 2 slip op. at 10.

"Probable cause to arrest exists when there is 'evidence that would warrant a [person] of reasonable caution in the belief that a (crime] has been committed' by the accused. Parretti v. United States, 112 F.3d 1363, 1368 (9th Cir. 1997) (quoting Wong Sun v. United States . 371 U.S. 471, 479 (1963)). -Courts took to the totality of the known to officers prior to any search conducted incident to the arrest." United Statgs y. Del Vizo,, 918 F.2d 821, 825 (1990) (citing United States v. Potter, 895 F.2d 1231, 1233-34 (9th Cir. 1990)). The officer was aware of the four items identified above, (1), (2), (3) and (4) before the arrest. People v. Tran, Case No. DO11037, slip op. at 6.

I I Considering the totality of the circumstances known to the

arresting officer in this case, the court finds there was sufficient probable cause to arrest Petitioner. Thus the suppression motion would have been denied. Petitioner has failed to meet his burden of showing the motion would have been granted. Therefore, Petitioner's claim must be denied.

2. Defense counsel's failire to suppress eyewitness identifications

Petitioner asserts that defense counsel's failure to file a motion challenging the lineup identifications also denied him effective assistance of counsel. 7he same standard as outlined above is required for Petitioner to prevail on his claing, he must show that counsel's performance was "outside the wide range of professional competent assistance and that her failure to file the motion prejudiced the outcome of the trial. Sticklmd, 466 U.S. at 690-694.

Trial counsel prepared a motion to suppress the lineup identification on the ground that it was unduly suggestive. Pet's Traverse Exh. 2. Although Petitioner's attorney did not file the motion, she did emphasized the suggestiveness of the lineup by extensively questioning during trial those persons that had identified Petitioner from the lineup. Rep. Tr. at 160-63, 170-81, 212-19, 449-53, 479-89, 513-15. In addition, counsel presented as defense witnesses three of the lineup participants in an attempt to

show that the lineup was suggestive. Rep. Tr. at 626-28, 640-42, 643-45. Whether to challenge the lineup identifications by pretrial motion or to use the suggestiveness to undermine the eyewitness identifications during trial, is a tactical decision.

A strong presumption of reasonableness is given to counseps tactical decisions. Strickland, 466 U.S.at 689. Trial counsel made a decision to challenge the lineup during trial before the jury rather than by pretrial motion. Again, counsel was faced with a choice between devoting valuable time and energy in litigating a suppression motion and preparing for trial. it is likely counsel weighed the chance for success on the motion against the need to bring the allegedly suggestive lineup before the jury. Counsel's decisions should not be scrutinized by applying twenty-twenty hindsight, nor second-guessing counsel's strategic decisions. Compbeft, 18 F.3d at 673. Although counsel apparently knew, from a memo written by a public defender, Pet.'s Traverse, Exh. 1, that there was a potentially viable argument for suppression, it was counsel's strategical

decision to challenge the lineup during trial rather than by motion. Therefore, in consideration of the strong presumption of reasonableness given such decisions, this court finds that counsel's decision not to file her motion to suppress the lineup identifications was not unreasonable.

Petitioner also fails to show that the failure of counsel to

move to suppress the lineup identifications was fatal to the defense. Again, the Petitioner is required to prove that the motion would have succeeded and as a result, the outcome of the trial would have been different. Kimmelman, 477 U.S. at 375. The appellate court found that the lineup was not suggestive. People v. Tran, Case No. DO11037, slip op. at 12. Petitioner claims that the motion would have been granted because the Petitioner was "so obviously highlighted." Pet's Traverse at 12. Petitioner was placed in a lineup withfive other Vietnamese or Southeast Asian males of varying heights, weights, and ages, all wearing identical jail clothing. Rep. Tr. at 628, 645. The witnesses based their identifications on their own recollections, not on the height, weight or age of the lineup participants. Rep.Tr.at 119-39,162-64,189,198-200,218-19,433-34,439-41, 451-53, 454, 473-77, 480-83, 488, 501-03, 517). Two of the lineup participants testified that they were not asked their age before standing in the lineup. Rep. Tr. at 628, 641. Based on these facts, this Court finds that the lineup procedure was not unduly suggestive and thus Petitioner has failed to show that the motion would have been granted.

In addition, Petitioner asserts that the in-court identifications came about only after the witnesses attended the allegedly suggestive lineup. Pretrial identification procedures may be the cause for exclusion of in-court identifications only whmr. "the

pretrial identification procedure, taken as a whole, 'was so impetmissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification'." United States 1. Williams. 436 F.2d 1166, 1169 (9th Cir. 1970); Manson y. Brathwaite, 432 U.S. 98 (1977). Prior to the lineup in question, the victims were instructed not to communicate with each other, and were not sitting next to each other. Rep. Tr- at 389-90, 747 The lineup was one of two conducted daring the police investigation. Eighteen viotims viewed the lineups, including those that identified Petitioner. Rep. Tr. at 744. The witnesses who identified Petitioner testified that they recognized him from the robbery, not the lineup. Rep. Tr. at 189, 218, 488, 501-05, 513-17. Since the witnesses based their identifications an their own recollections of Petitioner and the lineup was not impermissibly suggestive', there is no "'substantial likelihood of misidentification!' U Under these circumstances, this court *finds that* counsel's failure to move to suppress the in-court and out-of-court identifications of Petitioner did not prejudice the outcome of the trial. Therefore, Petitioners claim must be denied.

3. In-court identification of co-defendant

Petitioner claims his due process right to a fair trial was violated when the trial court allowed his co-defendant to be identified by a

witness during trial.[1] The state appellate court found the in-court identification of Petitioner's co-defendant was irrelevant to the proceedings and should not have been admitted. However, the appellate court found that the error was harmless[2].

This court must decide whether the appellate court's decision was "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1) (West Supp. 1997).

The Supreme Court has set forth a deferential harmless error standard pertaining to

5 habeas claims based on trial court error. A habeas Petitioner must show that the trial court error was not harmless and resulted in "actual prejudice" to the outcome of the trial. Brecht v.Abramson, 507 U.S. 619, 637 (1993). The test is "whether the error 'had

---

[1]Petitioner also claims, in his Traverse, that trial counsel's failur to keep the improper identification procedure from the jury denied him effective assistance of counsel. That claim was not raised in his Petition, nor has it been raised in state court. "A Traverse is not the proper pleading to raise additional grounds for relief " Cacoperdo v. Demosthenes, 37 F.3d 504 (9th Cir. 1994). Moreover, exhaustion of state remedies is a prerequisited to a federal court's consideration of claims presented in habess corpus proceedings. See Rose v. Lundy, 455 U.S. 509, 522 (1982). Accordingly, this Court will not consider Petitioner's claim since it was improperly raised in his Traverse and is unexhausted.

[2]Petitioner asserts that the court should have applied the harmless beyond a reasonable doubt standard in determining whether the error prejudiced the trial. However, the appellate court found the error harmless under both the outcome-determinative test and the harmless-beyond-a-reasonable-doubt standard. People v. Tran, Case No. D011037, slip op. at 19 n.14.

substantial and injurious effect or influence in determining the jury's verdict. ... LL (quoting Kotteakos v. United States 328 U.S. 750 (1946)). Petitioner argues that because the jurors knew several of the witnesses had identified the co-defendant from a lineup, the identification by. the witnesses during trial affected the jury's evaluation of the credibility of the identifications and of Petitioner's mistaken identity defense. (Pet's Traverse at 19).

The co-defendant appeared in a civilian shirt and without handcuffs. Rep. Tr. at 315. The proceeding was very brief mid involved no testimony other than the witness identifying him as a co-defendant. Rep. Tr. at 382. It is unlikely that this brief testimony could substantially
affect the jury's evaluation of the credibility of the witnesses or Petitioner's mistaken identity defense. Accordingly, this court finds that the error was harmless and Petitioner's claim must be denied.

IV. CONCLUSION AND RECOMMENDATION

After a thorough review of the record in this matter, the undersigned Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be DENIED with prejudice.

This Report and Recommendation of the undersigned Magistrate Judge is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. §

636(b)(1).

IT IS ORDERED that no later than August 4. 1997 any party to this action may file written objections with the Court and sem a copy on all parties. The document should be captioned "Objections to Report and Re On."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the court and served on all parties no later than August 27. 1997. The parties we advised that failure to file objections within the specified fi= may waive the right to raise those objections on appeal of the Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.1991).

DATED: July 1, 1997

LEO PAPAS
United States Magistrate Judge

J

FILED APRIL 28, 1998

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TUAN VAN TRAN, CASE NO. SBCV2161 BTM(LSP)

Petitioner,

ORDER ADOPTING REPORT AND RECOMMENDATION AND DENYING PETITION FOR WRIT OF HABEAS CORPUS

GARY LINDSEY, Warden,

Respondent

Tuan Van Tran was convicted of murder and three counts of robbery. He has petitioned for a writ of habeas corpus contending that he was denied effective assistance of counsel. More particularly, he contends this right was violated because his counsel withdrew a motion to suppress evidence due to a lack of probable cause to arrest him, failed to file a motion to suppress in and out of court identifications of Tran, and failed to object to the

bringing of the co-defendant (who was not jointly tried with Tran) Into the courtroom for identification. Tran also contends that the in court Identification of his co-defendant rendered the trial unfair, thereby denying him due process. The magistrate judge issued a report andrecommendation that the writ be denied. Tran filed objections. The Court~ having made a de novo, review of the record, ADOPTS the Report and Recommendation of Magistrate Judge Papas filed July 3, 1997.

Tran contends that his counsel's failure to pursue the motion to suppress evidence and in court identifications denied him effective assistance of counsel. This is not a case where defense counsel failed to explore legal issues. Rather, counsel filed a motion to suppress based on lack of probable cause, but later withdrew the motion. Counsel later told the trial judge that this was a tactical decision.' Defense counsel also prepared a motion to suppress eyewitness identifications but did not file it. The magistrate judge properly pointed out some reasons why defense counsel may have chosen to abandon these motions. This court notes that she may have chosen not to question witnesses on these issues prior to trial as it would reveal her questions and allow the witnesses to be better prepared before the jury. Defense

counsel obviously made a prediction as to whether the motions would be succ:essful. While the issues of probable cause for arrest and suggestiveness of the identification procedures were not

frivolous, four judicial officers, three state appellate judges, and a federal magistrate judge who routinely decides questions of probable cause under Fed. R. Crim. P. 5. 5.1, and 41 have found probable cause existed for the arresL The issue is not whether they are correct. Rather, it is whether counsel's representation was constitutionally deficient. It is apparent that defense counsel reasonably believed that It was unlikely that a judge would grant the motion and pressing it was not a good tactical choice.

Such analysis similarly applies to the pretrial Identification procedures. Additionally, Tran has not met his burden of showing prejudice in this respect because the In court identifications were based on the witnesses' observations at the time of the robbery. See Manson v. Brathwaite, 432 U.S. 98 ('1977).

Finally, the in court identification of the co-defendant was harmless. Therefore, counsel's failure to object is not grounds for granting the writ. The Identification did not deny Tran a fair trial.

CONCLUSION

The Court adopts the reasoning set forth in Magistrate Judge Papas' Report and Recommendation. For those reasons and the reasons set forth above, the Petition for Writ of Habeas Corpus is DENIED.

IT IS SO ORDERED.

Dated: APRIL 27, 1998

HONORABLE BARRY TED MOSKOWITZ

United States District Judge

Copies to:

Magistrate Judge

All parties and counsel of record

United States District Court

Southern District of California

Filed April 28, 1998

Tuan Tran

v.

Salinas Valley State Prison, State of California,

Centinela State Prison, and Gary Lindsey CASE

NUMBER: 96cv216 I -BTM(LSP)

_____Jury Verdict. This action came before the Court for a trial byjury. The issues have been tried and the jury has rendered its verdict

__X__Decision by Court. This action came to trial or hearing before the CourL The issues have been tried heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT JUDGE BARRY T. MOSKOWITZ ADOPTS THE REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE PAPAS, AND DENIES PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

April 29,1998 Roberta Westdahl

R. Chambers

(By) Deputy Clerk -

ENTERED ON April 29, 1998

UNITED STATES DISTRICT COURT FILED

JUNE 5, 1998

SOUTHERN DISTRICT OF CALIFORNIA

TUAN VAN TRAN

Civil No. 96-2161 BTM(LSP)

Petitioner

VS.

CERTIFICATE OF APPEALABILITY

Under 28 U.S.C. §2253

GARY LINDSEY, WARDEN, SALINAS VALLEY STATE PRISON,

Respondent

and

The Attorney General of the State of California,

Additional Respondent

This court hereby certifies that applicant has made a substantial showing of the denial of a constitutional right and that a Certificate of Appealability shall therefore issue following the denial of applicant's Petition for writ of habeas corpus in the

above-entitled case.

DATED: JUNE 5, 1998

HONORABLE BARRY TED MOSKOWITZ

JUDGE, U.S. DISTRICT COURT

U.S. 9th Circuit Court of Appeals

TRAN v LINDSEY

9856251

TUAN VAN TRAN,

Petitioner-Appellant,

No. 98-56251

v.

D.C. No.

GARY LINDSEY, Warden; SALINAS

CV-96-02161-BTM

VALLEY STATE PRISONS; STATE OF

OPINION

CALIFORNIA,

Respondents-Appellees.

Appeal from the United States District Court

for the Southern District of California,

Barry Ted Moskowitz, District Judge, Presiding

Argued and Submitted

September 14, 1999--Pasadena, California

Submission Withdrawn October 14, 1999

Resubmitted May 3, 2000

Filed May 16, 2000

Before: Stephen Reinhardt and Michael Daly Hawkins, Circuit Judges, and Ronald M. Whyte,1 District Judge.

Opinion by Judge Reinhardt

SUMMARY

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Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court. The court held that under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court must apply the "clearly erroneous" standard when reviewing a habeas petitioner's challenge to a state-court decision as involving an unreasonable application of clearly established federal law.

While investigating a series of robberies and a murder, San

Diego police arrested appellant Tuan Van Tran. Tran had driven Tho Tran (unrelated) to the apartment of Tho's brother, where police were executing a search warrant. Detective Larmour had seen Tran sitting in the car, and took him into custody when he gave his name as "Tuan Tran."

At the preliminary hearing, Larmour testified that he arrested Tran because his name was the same as one a victim heard used by one of the robbers; Tran was dressed entirely in black, as were the robbery suspects; Tran fit the general description of the suspects; and Tran and Tho gave inconsistent stories about how they arrived at the scene.

At trial, additional prosecution evidence showed that Tran had worn a ring that was stolen during one of the robberies; his fingerprints matched some taken at the scene of another robbery; and five witnesses had identified him in a lineup. Larmour made an in-court identification of Tho.

Tran denied participating in the robberies, asserting mistaken identity and alibi defenses. A jury convicted him of first-degree murder and robbery.

The California Court of Appeal affirmed. The court held

that Tran's claim of ineffective assistance of counsel failed because he showed no prejudice arising from his attorney's failure to pursue motions to suppress Tran's fingerprints and the lineup identification on the ground that Tran had been arrested without probable cause. The court also rejected Tran's due-process claim based on Larmour's in-court identification, holding that the error was harmless. The California Supreme Court denied review.

After exhausting his remaining state-court remedies, Tran sought federal habeas corpus relief. The district court denied Tran's petition, and he appealed.

[1] Under the AEDPA, a federal court may reverse a state court's decision denying relief only if it is contrary to, or involves an unreasonable application of, clearly established federal law as determined by the Supreme Court.

[2] A state court's decision can be "contrary to" federal law if it fails to apply the correct controlling authority, or applies controlling authority to a case involving facts materially indistinguishable from those in the controlling case, but reaches a different result. A decision can involve an "unreasonable application" of federal law if it correctly identifies the govern-

ing rule but applies it to a new set of facts in a way that is objectively unreasonable, or extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. [3] Some erroneous applications may be reasonable: an unreasonable application of federal law is different from an incorrect application.

[4] Under the AEDPA, a federal court must reverse a state court's decision as involving an unreasonable application of clearly established federal law when its independent review of the legal question leaves the court with a "firm conviction" that the legal argument rejected by the state court was correct, and the one adopted was erroneous--in other words, that clear error occurred.

[5] The only definitive source of clearly established federal law under the AEDPA is the holdings of the Supreme Court.

Only those holdings need be "reasonably" applied. The Supreme Court need not have addressed the identical factual circumstance at issue in a case for it to have created "clearly established" law governing that case. [6] When analyzing a claim that there has been an unreasonable application of federal law, a federal court must first consider whether the state

court erred; only after the court has made that determination may it consider whether any error involved an unreasonable application of controlling law.

[7] Tran contended that his due-process rights were violated when Tho Tran was brought into the courtroom and identified by Larmour. [8] The state court did not err in holding that the error was harmless. Tran's counsel had already referred to police surveillance of Tho and his arrest and identification, and Larmour had testified that the police were monitoring Tho's house because he was a suspect. Tran wanted the jury to believe that he was not involved in the robberies even though he gave Tho a ride. That the jury knew that Tho was in custody therefore could not have prejudiced the defense case. The state court's decision was not reversible under the AEDPA.

[9] When analyzing lineup claims, a reviewing court must determine if the procedures in question were unnecessarily suggestive. Even if the procedures were suggestive, the resulting evidence is excludable only if it is not reliable. The state court did not err in concluding that the lineup was not unlawful. Tran did not so obviously stand out as to create a substantial likelihood of misidentification. [10] As there was no

prejudice from the failure to pursue a motion to suppress the lineup identification, the court of appeals did not need to consider whether counsel's failure constituted deficient performance.

[11] Probable cause to arrest exists when the facts and circumstances within the officers' knowledge, and of which they had reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the individual to be arrested has committed the crime in question. The state court cited this standard and intended to apply it. As none of the Supreme court's cases involve facts materially distinguishable from those at issue in this case, the state court's decision was not contrary to clearly established law. The question was therefore whether the state appellate court unreasonably applied controlling federal law.

[12] Clearly established federal law ordinarily is found at the level of generality of a general rule. While the probable cause test constitutes clearly established federal law, past applications of the test come into play only when the federal court decides whether the application before it is "contrary to" or an unreasonable application of the rule in question. If an application in a case before the court conflicts with either the

rule or a past application of the rule by the Supreme Court, the case will involve a "contrary to" question. Otherwise, it will involve a reasonable application issue.

[13] The state court's decision was in error, but the error was not objectively unreasonable. [14] The facts were not enough to cause a person of reasonable caution to believe that Tran participated in the robberies. The temporal connection between the robberies and Tran's association with Tho was insufficiently close to constitute relevant association. The other factors were insufficiently substantial to warrant a probable cause finding. Cases upholding arrests for probable cause typically involve considerably more evidence. Nevertheless, the court of appeals could not say that the decision was clearly erroneous. The issue was too close. Accordingly, the decision did not involve an unreasonable application of clearly established federal law.

COUNSEL

Allen Bloom, San Diego, California, for the petitioner-

appellant.

Garrett Beaumont, Deputy Attorney General, San Diego, California, for the respondents-appellees.

OPINION

REINHARDT, Circuit Judge:

We must once again examine the question whether a state court decision denying a petitioner's ineffective assistance of counsel claim was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court -- this time in light of the Supreme Court's recent decision in Williams v. Taylor , 120 S.Ct. 1495 (2000). Petitioner, Tuan Tran, appeals the district court's denial of his petition for a writ of habeas corpus, claiming that he received ineffective assistance of counsel because his lawyer did not pursue motions to suppress evidence based on a lack of probable cause to arrest him and the use of an impermissibly suggestive lineup. Tran also contends that the in-

court identification of his co-defendant during his trial violated his due process rights.

FACTS

Petitioner Tuan Van Tran (hereinafter "Petitioner " or "Tran") was arrested on February 11, 1989, by San Diego police officers who were investigating a series of residential robberies, including a robbery-murder. That day, Petitioner had driven co-defendant Tho Tran (not a relative) in his car to Tho's brother's apartment. At the time, the police were executing a search warrant at the apartment, as Tho was a suspect in the robberies.2 Shortly thereafter, investigating officer Detective Larmour noticed that Petitioner was sitting in a car parked behind the apartment and approached him. Petitioner identified himself as "Tuan Tran" and produced his driver's license. Larmour then took him to the apartment and arrested him.

Larmour testified, both at a preliminary hearing and at trial, that he based his arrest of Petitioner on several facts known to him at the time of the arrest. First, Petitioner's name, Tuan, was the same as the name that a robbery victim had heard used by one of the robbers during an attack. Second, accord-

ing to Larmour, Petitioner was dressed entirely in black, as were the suspects in the robberies.3 Third, he fit the description of the suspects, as he was 20 to 25 years old and between 5'5" and 5'9", and he spoke in Vietnamese.4 Fourth, Larmour testified that Tho Tran and the Petitioner told him inconsistent stories about how they had arrived at the scene.

After his arrest, Petitioner consented to a search of his automobile where a knife was found.5 He was then taken to a hospital for a physical examination and collection of evidence. While at the hospital, police seized Tran's clothing and his gold ring, which was later identified as one stolen from a victim's mother. Tran was also fingerprinted at the station that evening. Police tested his fingerprints and found that they matched some of those found at the scene of the robbery-murder that took place on February 2. While in custody, Petitioner was placed in a live lineup. Five witnesses identified him through that procedure as one of the robbers.

Roughly three weeks after Petitioner was arraigned, defense counsel filed a motion to suppress evidence arising from the arrest, including Petitioner's fingerprints and the lineup identification evidence, on the ground that he had been arrested without probable cause. This motion was later with-

drawn by defense counsel for unexplained "tactical reasons." In addition, defense counsel prepared, but never filed, a motion to suppress the out-of-court and in-court identifications of Tran on the ground that they were too suggestive to comport with Fifth Amendment standards.

At trial, the evidence against Petitioner consisted of the following: He was named Tuan, and a victim during one of the robberies had heard a robber referred to as Tuan. He fit the description of one of the robbery suspects. He wore a gold ring that was later identified as one stolen at the first robbery, on January 18, 1989. His fingerprints matched prints found at the scene of the second robbery (on February 2), and five witnesses identified him at the lineup. Some identified him at trial as well.

Petitioner denied participating in any of the robberies or the murder. At trial, he presented a defense of mistaken identity and alibis. During the trial, the prosecution brought in co-defendant Tho Tran for Detective Larmour to identify. Tho appeared in civilian clothes, without handcuffs. He did not testify. This identification is the subject of Petitioner's due process claim.

A San Diego Superior Court jury found Petitioner guilty of one count of first degree murder and three counts of residential robbery. On appeal, Petitioner argued that he received ineffective assistance of counsel because counsel failed to pursue the motions to suppress, and that the identification of co-defendant Tho in court violated due process. The California Court of Appeal, Fourth Appellate District, affirmed the conviction, holding that Tran suffered no prejudice from counsel's failure to pursue the motions to suppress, and that the due process violation was harmless error. People v. Tran, Case No. D011037, slip op. at 17-19 (Cal. Ct. App. 4th Dist. Div. 1 Jan. 23, 1991). The California Supreme Court denied Tran's appeal without opinion. Petitioner subsequently filed habeas petitions in state court which were denied. After two earlier federal habeas petitions were dismissed for failure to exhaust state remedies, the petition before us was filed, on December 18, 1996. A magistrate recommended denying the petition, and the district court adopted the reasoning set forth in his recommendation, along with some further comments of its own.

ANALYSIS

Because Tran's petition was filed on December 18, 1996,

we review it under the provisions of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Lindh v. Murphy, 521 U.S. 320 (1997). Tran argues that AEDPA should not govern his petition because he first sought habeas review in 1993, prior to the date of AEDPA's enactment. Both that first petition and another petition that he filed in January 1995 were dismissed for failure to exhaust state remedies. He asserts that his current petition "relates back" to his first petition for habeas review. However, we have held that a second petition does not relate back to a first petition where the first petition was dismissed for failure to exhaust state remedies. Henry v. Lungren, 164 F.3d 1240, 1241 (9th Cir. 1999).

Tran argues that Calderon v. United States District Court (Gordon), 107 F.3d 756 (9th Cir. 1997) requires that we look to his first petition to determine what law applies. In that case, we decided that funds to investigate unexhausted claims could be awarded to a habeas petitioner even after a petition was dismissed for failure to exhaust. However, our holding in Calderon was based on the power of a district court to authorize funds prior to the initiation of habeas litigation. See Calderon, 107 F.3d at 761-62 (citing McFarland v. Scott , 512 U.S. 849 (1994)). As the power to authorize funds and attorneys' fees constitutes a special circumstance for jurisdictional purposes,6

we decline to extend Calderon's holding, especially where doing so would likely create a conflict with Henry.7

STANDARD OF REVIEW UNDER AEDPA

[1] The question whether the defendant has received ineffective assistance of counsel is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994). Prior to AEDPA mixed questions in habeas petitions were reviewed de novo. Moran v. Godinez, 57 F.3d 690, 699 (9th Cir. 1995); Crotts v. Smith, 73 F.3d 861, 864 (9ldth Cir. 1996). Under AEDPA, the standard of review we apply is governed by 28 U.S.C. S 2254(d) and the Supreme Court's recent decision in Williams v. Taylor, 120 S.Ct. 1495 (2000). Under AEDPA, we may reverse a state court's decision denying relief only if that decision is "contrary to, or involves an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States." 28 U.S.C. S 2254(d)(1).

In Williams, the Supreme Court reversed the Fourth Circuit's denial of habeas relief to a capital defendant on ineffective assistance of counsel grounds.8 In so doing, the Court

largely resolved much of the disagreement concerning how to interpret AEDPA's provision governing federal court review of state court determinations of law. First, the Court made clear that the statute embodies no distinction between pure questions of law and mixed questions of law and fact that corresponds to its division between decisions "contrary to" federal law and decisions involving an "unreasonable application of" federal law.9 The holding of the Court, endorsed by six justices, was that the Virginia Supreme Court's application of ineffectiveness law, a classic mixed question, was both contrary to clearly established federal law and an unreasonable application of such law. Williams, 120 S.Ct. at 1515. Moreover, Justice O'Connor's opinion for the Court interpreting AEDPA gave an example of a state court decision that could be "contrary to" Strickland in the course of explaining what that term meant. Id. at 1519-20. Thus, both prongs of S 2254(d) apply to both questions of law and mixed questions.

[2] However, Justice O'Connor's opinion for the Court on the meaning of S 2254(d) also made clear that "contrary to" and "involve an unreasonable application of" have distinct meanings. A state court's decision can be "contrary to" federal law either 1) if it fails to apply the correct controlling authority, or 2) if it applies the controlling authority to a case

involving facts "materially indistinguishable " from those in a controlling case, but nonetheless reaches a different result. Id. at 1519-20. A state court's decision can involve an "unreasonable application" of federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. Id. at 1520. However, the Court recognized that these categories could overlap, and that, even for purposes of precise definition, it could sometimes be difficult to determine whether a decision, for example, unreasonably extended a rule to a new context or simply contradicted controlling authority. Id. at 1521. Similarly, it seems apparent that in some cases it may be difficult to distinguish between, on the one hand, a state court decision that is contrary to clearly established federal law by virtue of its reaching a different result upon materially indistinguishable facts, and, on the other, a particularly unreasonable application of clearly established federal law.10 Thus, as we have said previously, the two concepts overlap and it will be necessary in some cases to test a petitioner's allegations against both standards. Davis v. Kramer, 167 F.3d 494, 500 (9th Cir.) vacated on other grounds 120 S.Ct. 1001 (2000).

[3] The Supreme Court did not specifically define "unreasonable" in the context of decisions involving "unreasonable applications" of federal law, but it provided some explanations to help guide us in applying the concept. First, it made clear that some erroneous applications may nonetheless be reasonable: "an unreasonable application of federal law is different from an incorrect application of federal law. " Williams, 120 S.Ct. at 1522 (citing Wright v. West, 505 U.S. 277, 287 (per Thomas, J.)).11 At the same time, the Court rejected the interpretation, adopted in various forms by the Fourth, Fifth, Seventh, and Eleventh Circuits, that defines reasonableness on the basis of whether "reasonable jurists" could disagree about the result reached by the state court.12 Instead, the Court adopted an "objectively unreasonable" standard, employing the language used in decisions by the Third and Eighth Circuits. Matteo v. Sci Albion, 171 F.3d 877, 889-90 (3d Cir. 1999); Long v. Humphrey, 184 F.3d 758, 760-61 (8th Cir. 1999). We think it significant that the Third and Eighth circuits adopted that test, rather than the tests developed by other circuits, because they determined that the other circuits' tests were too deferential. The Supreme Court thus chose to adopt the interpretation of AEDPA that espoused the more robust habeas review. As the Eighth Circuit explained,

> The Third Circuit has rejected [the other approaches], stating that the reasonable jurist test discourages the granting of relief by requiring federal habeas courts to hold the state court acted in a way no reasonable jurist would under the circumstances and that the outside-the-universe-of-plausible-outcomes test [of the First Circuit] excludes all but those decisions so off the mark that they approach judicial incompetence.

Long, 184 F.3d at 760 (citing Matteo, 171 F.3d at 889). Thus, we must construe the Court's opinion with its endorsement of those decisions in mind.

Although the Court stated that "unreasonable" is a "common term in the legal world and, accordingly, federal judges are familiar with its meaning," Williams, 120 S.Ct. at 1522, it pointed to no particular body of law as a suitable model. While it is true that determinations of reasonableness are common in the law, (e.g., proof beyond reasonable doubt, In re Winship, 397 U.S. 358, 364 (1970); reasonable suspicion, Terry v. Ohio, 392 U.S. 1, 21 (1968); harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18, 23-24 (1967); reasonable speech restrictions on access to nonpublic

fora, Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 808 (1985); reasonable time period for post-removal order detention, Ma v. Reno, 2000 WL 258445 (9th Cir. Apr. 10, 2000)), such determinations rarely involve a judgment as to the reasonableness of a particular piece of legal reasoning. On the contrary, federal courts have not ordinarily judged the reasonableness, rather than the correctness, of a court's applications of federal law. Still, we consider several possible precedential sources in our effort to determine how to classify erroneous applications of federal law as reasonable or unreasonable.13

One possible source of helpful cases might be the law governing federal court review of agency action. The federal courts have applied a "reasonableness" test when reviewing certain legal questions under Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). In Chevron, the Court established the rule that when Congress has left a gap in a statute and authorized a federal agency to fill that gap, the agency's interpretation is to be accorded deference as long as it is a "reasonable" interpretation of the statute. Id. at 843-44.

Despite its surface similarity to the question before us, however, the deference test in Chevron is crucially different from the test we must apply, in several ways. First, the Chev-

ron test was developed to apply in situations in which a federal agency has unique competency to fill gaps in its own governing statute that Congress has left for it to fill. Id. at 844. When an agency does not have special competence to fill such gaps, it is not accorded Chevron deference. See, e.g., Martin v. OSHRC 499 U.S. 144, 155 (1991). Obviously, the state courts do not have special competence with respect to questions of federal law. Thus, while the state courts are co-equal interpreters of the Constitution, they do not play a role analogous to that of administrative agencies that are entitled to Chevron deference. Second, where an agency's interpretation is contrary to the provisions of the statute, the federal courts are required to strike it down. Chevron , 467 U.S. at 842-43; Earth Island Institute v. Mosbacher, 929 F.2d 1449, 1452 (9th Cir. 1991) (striking down regulation as inconsistent with statute). In contrast, the Court's opinion in Williams makes clear that, in some circumstances, erroneous interpretations can be upheld on habeas because they are "reasonable." Williams, 120 S.Ct. at 1522. These are, of course, only examples of some of the distinctions inherent in our review of agency decisions and those of state courts interpreting federal law. Thus, for a number of reasons, Chevron deference sheds little light on the problem before us.

Another possible source of analogous case law might be the law relating to qualified immunity. Under that doctrine, we sometimes determine whether a reasonable law enforcement official could have believed that his conduct was lawful. See Act Up! v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993). While, again, the word "reasonable" is used in both circumstances, the rationale underlying the qualified immunity test renders that standard unsuitable for application to our review of state court decisions. Qualified immunity doctrine provides immunity from suit to certain government officials in spite of their having engaged in unlawful conduct because, in some contexts, it would be wrong to hold officials liable for damages where the law they are accused of violating was not clearly established. The Supreme Court has made it clear that officials whose jobs require them to perform discretionary functions must be able to fulfill their duties vigorously, and that this requires that they not be held liable for unlawful conduct where the law they violated was uncertain. Butz v. Economou, 438 U.S. 478, 507 -07 (1978). In contrast, our review of state court decisions under AEDPA is not constrained because the state courts' functions are somehow more discretionary than ours, or because they must be more vigorous in the discharge of their duties. Rather, the Court has stated that deferential review in habeas cases is premised on the fact that the state

courts, as part of a co-equal judiciary, are competent interpreters of federal law deserving of our full respect. Williams, 120 S.Ct. at 1518 (citing Miller v. Fenton, 474 U.S. 104, 112 (1985)). The Congressional policy limiting our authority to reverse state court judgments is motivated, therefore, by dictates of comity, rather than by a sense that the state courts, like law enforcement officials, should not be held responsible for failing to follow carefully the requirements of federal law.

Instead of relying on these faux analogues for guidance in determining what econstitutes an "unreasonable application" of federal law, we look to the doctrine of "clear error" as the source for the most helpful body of precedent. The clear error doctrine guides our review for two reasons. First, unlike the other doctrines described above, we have used "clear error" to examine and sometimes to uphold erroneous decisions of other courts on questions of law.14 Second, we have developed the "clear error" standard, as applied to questions of law (e.g. in mandamus cases), as part of a more general test designed to preserve "the mutual respect that is an indispensable element of the relationship between federal trial and appellate courts." In re Cement Antitrust Litigation , 688 F.2d 1297, 1301 (9th Cir. 1982) (applying clear error of law standard to mandamus petition). The "mutual respect" that informs the

use of the clear error standard is highly analogous to the comity concerns at issue in habeas cases. We stress that this does not mean that reversals in habeas cases should be as rare as the granting of mandamus petitions. The Supreme Court rejected extremely deferential approaches to habeas review in favor of an approach that did not aim to "discourage the granting of relief." Long, 184 F.3d at 760. Moreover, clear error is only one of five factors involved in making mandamus decisions, and we have long held that mandamus is a "drastic" and "extraordinary" remedy. Washington Public Utilities, 843 F.2d at 323. Nevertheless, we believe the clear error doctrine -- as developed not only in the mandamus context, but in other legal contexts as well, such as law of the case -- in which federal courts have determined whether legal conclusions were clearly erroneous, most nearly reflects the kind of respect for other courts' judgments that Congress and the Court felt was required here.

Although the definition of clear error we have employed in differing contexts varies to some extent, it generally allows for reversal only where the court of appeals is left with a "definite and firm conviction" that an error has been committed. See, e.g., Washington Public Utilities Group v. United States District Court (Puchall), 843 F.2d 319, 325 (9th Cir. 1988)

(applying "firm conviction" test to determine if legal judgment was clearly erroneous for purpose of mandamus action); In re Cement Antitrust Litigation, 688 F.2d 1297, 1301 (9th Cir. 1982) (same); Topanga Press v. City of Los Angeles, 989 F.2d 1524, 1527 (9th Cir. 1993) (reviewing grant of preliminary injunction under firm conviction test) United States v. Nelson, 137 F.3d 1094, 1106 (9th Cir. 1998) (analyzing motion for mistrial under firm conviction test where result turned on question of law (sufficiency of the evidence)); Peterson v. Highland Music, 140 F.3d 1313, 1323 (9th Cir. 1998) (applying firm conviction test to review of contempt finding, where finding requires determination that contempt was proven by clear and convincing evidence); United States v. Barbosa, 906 F.2d 1366, 1370 (9th Cir. 1990) (holding that firm conviction test applies to review of district court's application of Sentencing Guidelines to the facts); see also Sawyer v. Whitley, 505 U.S. 333, 372 (1992) (Stevens, J., concurring in part and dissenting in part) (advocating use of firm conviction standard for considering whether death sentence should have been imposed when reviewing defaulted claims on habeas).

[4] We believe that the clear error standard occupies the middle ground that the Williams Court marked out when it

rejected the arguments of those who contended that an independent determination of prejudicial error by a federal court was sufficient and of those who argued for the overly deferential "reasonable jurists" standard. Therefore, we hold that under AEDPA we must reverse a state court's decision as involving an "unreasonable application" of clearly established federal law when our independent review of the legal question does not merely allow us ultimately to conclude that the petitioner has the better of two reasonable legal arguments, but rather leaves us with a "firm conviction" that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous -- in other words that clear error occurred.

[5] With respect to the appropriate source of law, Justice O'Connor's opinion for the Court establishes that the only definitive source of clearly established federal law under AEDPA is the holdings (as opposed to the dicta) of the Supreme Court. Williams, 120 S.Ct. at 1523. This is consistent with our interpretation of the "clearly established federal law" requirement as set forth in our pre-Williams jurisprudence. As we explained in Duhaime v. Ducharme , 200 F.3d 597, 600-01 (9th Cir. 1999), there is still a role for circuit law in habeas cases: we still look to our own law for its persuasive

authority in applying Supreme Court law; however, only the Supreme Court's holdings are binding on the state courts and only those holdings need be "reasonably" applied.

> [The new provision] does not mean that Ninth Circuit caselaw is never relevant to a habeas case after AEDPA. Our cases may be persuasive authority for purposes of determining whether a particular state court decision is an "unreasonable application " of Supreme Court law, and also may help us determine what law is "clearly established." See MacFarlane v. Walter, 179 F.3d 1131, 1139 (9th Cir.1999) (looking to Ninth Circuit caselaw to confirm that Supreme Court case clearly establishes a legal rule); citing [sic] O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir.1998) (holding that "to the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness vel non of the state court's treatment of the contested issue").

Duhaime, 200 F.3d at 600-01.15 See also Dows v. Wood, 2000 WL 489599, *4 (9th Cir. Apr. 27, 2000) (adopting reasoning from on-point Ninth Circuit case to help decide habeas peti-

tion under AEDPA). In addition, we have held that the Supreme Court need not have addressed the identical factual circumstance at issue in a case in order for it to have created "clearly established" law governing that case. See MacFarlane v. Walter, 179 F.3d 1131, 1139 (9th Cir. 1999).16 However, we may not, of course, reverse a state court's decision simply because it is inconsistent with a rule established by a Ninth Circuit case.

[6] Finally, we must address a methodological concern with respect to our review of habeas petitions under AEDPA. Respondent's brief argues that we should proceed directly to the question whether the state court's decision was reversible under AEDPA, and implicitly suggests that we need not first consider whether the state court's decision was erroneous, as long as we find that it was not contrary to and did not involve an unreasonable application of clearly established federal law as determined by the Supreme Court. We disagree. Although the Court did not speak to this issue in Williams, in another recent case the Court employed the approach we adopt here. In Weeks v. Angelone, 120 S.Ct. 727, 729, 734 (2000), the Court first addressed the question whether the state court decision was erroneous and then, on the basis of its answer, concluded that AEDPA barred relief, rather than asking ini-

tially whether the state court decision was unreasonable under that statute. The Court also endorsed this approach in another context, stating that federal courts should first say what the law is, even when that inquiry alone does not determine whether relief should be granted in a particular case. See Wilson v. Layne, 526 U.S. 603, 609 (1999) (holding that, in qualified immunity cases, courts should address whether law was violated prior to determining whether it was clearly established); County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) (same); see also Wilkinson v. Russell, 182 F.3d 89, 112-13 (2d Cir. 1999) (Calabresi, J., concurring) (discussing benefits of resolving status of law in qualified immunity cases).17 Requiring federal courts to first determine whether the state court's decision was erroneous, prior to considering whether it was contrary to or involved an unreasonable application of controlling law under AEDPA, promotes clarity in our own constitutional jurisprudence and also provides guidance for state courts, which can look to our decisions for their persuasive value. Duhaime, 200 F.3d at 600-01. Such a rule also respects our duty, as Article III judges, to say "what the law is." Williams, 120 S.Ct. at 1505 (Stevens, J., concurring) (citing Marbury v. Madison, 1 Cranch 137, 177 (1803)). Accordingly, we hold that, when analyzing a claim that there has been an unreasonable application of federal law, we must first

consider whether the state court erred; only after we have made that determination may we then consider whether any error involved an unreasonable application of controlling law within the meaning of S 2254(d).

LEGAL ISSUES

Tran raises three alleged reversible errors by the state court. With respect to two of his claims, the in-court identification of his co-defendant and the lineup evidence, we hold that no error occurred. With respect to the third, probable cause for his arrest, we hold that the state court erred, but that the error was not "contrary to" and did not "involve an unreasonable application of" clearly established federal law as determined by the Supreme Court.

1. Due Process

[7] Tran contends that his due process rights were violated when, during the trial, co-defendant Tho Tran was brought into the courtroom and identified by Detective Larmour. Tran argues that the identification evidence was irrelevant, as he did not contest that Tho was the person arrested with him. The state court agreed, but found the error harmless.

[8] The state court did not err in holding that the error was harmless. Tran's counsel had already referred to police surveillance of Tho and his subsequent arrest and identification, and Detective Larmour had testified that the police were monitoring Tho's house because he was a suspect. Petitioner wanted the jury to believe that he was not involved in the robberies even though he gave Tho a ride. Therefore, that the jury knew that Tho was in police custody could not have prejudiced the defense's case. As the state court did not err in concluding that any error was harmless, it follows that its decision is not reversible under AEDPA.

2. Ineffective Assistance of Counsel

Both of Tran's remaining claims involve ineffective assistance of counsel. To receive relief under Strickland v. Washington, 466 U.S. 668, 698 (1984), Tran must show that his counsel's performance fell outside "the wide range of professionally competent assistance" 466 U.S. at 690, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Tran asserts that his counsel was ineffective because he failed to make motions to suppress (1) identification evidence on the basis of a suggestive lineup and (2) evidence obtained as a result of his arrest because the arrest occurred without "probable cause." The Supreme Court has held that counsel's failure to file a motion to suppress evidence can provide the basis for a claim of ineffectiveness. Kimmelman v. Morrison, 477 U.S. 365 (1986). Kimmelman held that in order to show prejudice when a suppression issue provides the basis for an ineffectiveness claim, the petitioner must show that he would have prevailed on the suppression motion, and that there is a reasonable probability that the successful motion would have affected the outcome. Id. at 375.

The state court ruled for the state on prejudice grounds, and therefore did not consider the question whether Tran's counsel's performance was deficient. This practice is specifically authorized in Strickland. 477 U.S. at 375. We, too, will begin our analysis by examining the question whether Tran would have prevailed on the motions had counsel pursued them.

A. Lineup Identifications

[9] When analyzing lineup claims, a reviewing court must

determine if the procedures in question were "unnecessarily suggestive." Neil v. Biggers, 409 U.S. 188, 198 (1972). Even if the procedures were suggestive, the resulting evidence is only excludable if it is not reliable. Id. at 199-200. Here, the state court did not err in concluding that the lineup was not unlawful. The court held that, although some of the fillers in the lineup were "arguably somewhat heavier, thinner, taller or shorter, unkempt, or older than Tran" there was no absolute requirement that the other persons in the lineup be "nearly identical" to Tran. It concluded that "reviewing the exhibits and exercising our independent judgment, Tran does not so obviously stand out as to create a substantial likelihood of misidentification."18

[10] We have reviewed the photograph of the lineup and agree with the state court's conclusion. Moreover, this circuit has rejected similar claims involving lineups where the defendant looked fairly similar to others in the lineup. United States v. Barrett, 703 F.2d 1076, 1084-85 (9th Cir. 1983); United States v. Collins, 559 F.2d 561, 563 (9th Cir. 1977). As there was no prejudice from the failure to pursue a motion to suppress the lineup identifications, we need not consider whether counsel's failure constituted deficient performance.

B. Probable Cause

The state appellate court's probable cause ruling presents a much closer question. Although we believe that the ruling was erroneous, it was not "contrary to" clearly established federal law; more important, the error did not involve an unreasonable application of federal law. Put differently, there was error, but not clear error.

[11] The controlling law with respect to probable cause has been clearly established by the Supreme Court. "Probable cause exists where `the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (internal quotation omitted); Wong Sun v. United States, 371 U.S. 471, 479 (1963); Dunaway v. New York, 442 U.S. 200, 208 n.9 (1979). The Supreme Court has applied this test to arrests, holding that probable cause requires that the officers have similarly sufficient information to believe that the individual to be arrested has committed the crime in question. Dunaway, 442 U.S. at 208 n.9. The state court cited this standard, and clearly intended to apply it. As none of the Supreme Court's cases involve facts materially

indistinguishable from those at issue here, the state court's decision was not contrary to clearly established law. The ultimate question before us, therefore, is whether the state appellate court unreasonably applied the controlling federal law.

[12] As our above analysis illustrates, the clearly established federal law, the application of which must be determined to be reasonable or unreasonable, is ordinarily to be found at the level of generality of a general rule. Where there is an overall multi-factor test, for example, the clearly established federal law consists of the multi-factor test itself, not of any particular applications of the test.19 Thus, while the probable cause test itself constitutes clearly established federal law, the past applications of the test come into play only at a later stage in our analysis -- when we decide whether the application before us is "contrary to" or an unreasonable application of the rule in question. If an application of a rule in a case before us conflicts with either the rule itself or a past application of the rule by the Supreme Court, then the case will involve a "contrary to" question. Otherwise, it will involve a reasonable application issue.

Of course, we cannot set forth here a precise mechanism for determining the appropriate level of generality with

respect to every type of legal question. Suffice it to say that we must refrain from applying too narrow or too specific a standard when determining the substance of the law the application of which we must assess. The adoption of too limited a scope for the definition of "clearly established law" would collapse the various parts of the analysis we must perform and prevent a proper application of the Williams mandate.

In determining that the arresting officer had probable cause, the state appellate court reported the following facts in its opinion: (1) Tran and his co-defendant gave inconsistent stories about how they arrived at the apartment that the police were searching, (2) Tran was in a car with an identified robbery suspect on the same day a robbery occurred, and admitted that he and the suspect traveled to the apartment together, (3) Tran's first name matched the name of a robber heard by a victim of one of the robberies, (4) Tran fit the general description of one of the robbers. The state court concluded that these facts established probable cause, given the totality of the circumstances. There is one problem with the facts as reported, however. There is no evidence in the record that the arresting officer knew that the suspect, Tho, was involved in a robbery that had occurred that day (or that any robbery at all had occurred that day). Accordingly, we must disregard

that specific aspect of the state court's rationale. However, we do take into account related facts that appear in both the opinion and the record: namely, that the officer knew that there had been a series of robberies that had occurred in the period prior to the arrest, that Tho was a suspect in those robberies, and that the last robbery of which the officer had knowledge occurred nine days before petitioner's arrest.

[13] After carefully considering the factors mentioned above, we conclude that the state court's decision was in error, but that the error was not objectively unreasonable. Petitioner fit the physical description of one of the suspects -- he appeared to be between 18 and 20 years of age, was of slight build, Vietnamese, clean shaven, and approximately 5® 5". While we have previously found a description of "a young, thin man, not too tall" and "a young Mexican kid" in United States v. Ricardo D., 912 F.2d 337, 338 (9th Cir. 1990), to be insufficient to warrant a probable cause finding, in that case the description was both general and constituted the primary basis for the arrest. Here, in contrast, the description was more specific. The police knew a specific age range, a specific height range, a description of the suspect's build and (lack of) facial hair, and a definitive racial identification. Moreover, this was not the only information on which the

officers relied.

The officers also knew that one of the suspects was named "Tuan." This factor would be entitled to substantial weight were the petitioner's name unusual. However, evidence in the record shows that the robberies in question were occurring within the large Vietnamese community in San Diego, and that Tuan is an extremely common name in that community. For example, in this case, the Petitioner, one of the witnesses, and another suspect were all named Tuan. Nonetheless, the identity of the names is of some value, and the court was entitled to give it some weight.

The state court's reasons, as we modify them, see n. 20 supra, also included the fact that Petitioner was in the company of a suspected robber who had been engaged in a continuous series of robberies. Although the mere association of someone with a criminal suspect does not give rise to probable cause, Ybarra v. Illinois, 444 U.S. 85, 91 (1979), here the association was to some extent connected in time to suspicious activity, both because Tran was driving Tho to a location that was the subject of a search warrant in connection with the robberies and because Tho was a suspect in an ongoing series of robberies.

Finally, Petitioner and co-defendant Tho Tran gave inconsistent stories regarding how they arrived at the apartment. While Petitioner claimed that he had driven Tho there, Tho claimed that he had walked. The fact that Petitioner was telling the truth does not negate this factor, because at the time the arrest was made Tho's lie gave the police reason to believe that one of the two was lying, and therefore suggested that there was something to cover up.20

[14] The state court ruled that, considering the totality of the relevant factors, there was probable cause for Tran's arrest. See Illinois v. Gates, 462 U.S. 213, 238 (1983) (adopting totality of circumstances test for probable cause determinations). Were we reviewing this case de novo, we would hold that the state court's decision was erroneous; the facts adduced here were not enough to cause a person of reasonable caution to believe that Tran had participated in the robberies. The temporal connection between the robberies and Tran's association with Tho was insufficiently close to constitute relevant association under Ybarra. See United States v. Hillison, 733 F.2d 692, 697 (9th Cir. 1983), and United States v. Hoyos, 892 F.2d 1387, 1393 (9th Cir. 1988). In the absence of such an association, the other factors are simply insuffi-

ciently substantial to warrant a probable cause finding. Cases upholding arrests for probable cause typically involve considerably more evidence than this. See, e.g., United States v. Meza-Corrales, 183 F.3d 1116, 1124 (9th Cir. 1999); United States v. Valencia, 24 F.3d 1106 (9th Cir. 1994); United States v. Hoyos, 892 F.2d 1387 (9th Cir. 1989). Nevertheless, after reviewing the record and the relevant cases, we cannot say, applying a firm conviction standard, that the court's decision was clearly erroneous. The issue is simply too close. Accordingly, we conclude that the state court's decision did not involve an unreasonable application of clearly established federal law.

CONCLUSION

Having found that the state court's decision was not contrary to, and did not involve an unreasonable application of, clearly established federal law, we affirm the district court's denial of Tran's habeas petition.

AFFIRMED.

FOOTNOTES

1 The Honorable Ronald M. Whyte, United States District Judge for theNorthern District of California, sitting by designation.

2 Based on the identification of co-defendant Tho Tran made by a victimafter the second robbery, on February 2, the police put Tho Tran under surveillance for several days, and also compiled a list of 15 to 20 individu-als possibly known to Tho Tran. The list included Petitioner's name,although he was not at that time considered a suspect in the crimes.

3 Because Petitioner contested this fact, the state court did not rely on itwhen ruling that there was sufficient probable cause for the arrest.

4 Larmour initially testified that he understood that the suspects were described as 20 to 25 years old and 5' 5" to 5' 9" in height. However, cross examination, he stated that the actual description was of someone between 18 to 20 years old and closer to 5' 5". Petitioner was 19 years oldand 5' 5".5 At the time, Tuan stated that the knife belonged to his wife who used the knife to peel fruit for which she had cravings (she was pregnant). The knife was mentioned during trial but the trial court sustained an objection to its admissibility. It was never connected to the crimes.

6 See, e.g., Masalosalo v. Stonewall Insurance Co., 718 F.2d 955, 956 (9th Cir. 1983) (holding that district court retains jurisdiction

to resolve attorneys' fees issues after appellate court has taken jurisdiction on mer-its).

7 We express no opinion about the applicability of AEDPA to a second petition where the district court retained a jurisdictional interest in a first, pre-AEDPA petition, even though that first petition was dismissed for failure to exhaust. See, e.g., Williams v. Vaughan, 1998 WL 238466 (E.D. Pa. 1998); Kethley v. Berge, 14 F.Supp.2d 1077 (E.D. Wis. 1998). Here, Tran does not argue that the district court which dismissed his first petition retained an interest in it or that it intended to foreclose the application of AEDPA to any future petition. Nor, in light of his arguments, need we be concerned with what event constitutes the initiation of habeas proceedings.See McFarland v. Scott; 512 U.S. 849 (1994); Calderon v. United States District Court (Kelly), 163 F.3d 530, 539-40 (9th Cir. 1998) (en banc). Finally, Tran also does not argue that the application of AEDPA to his petition would be impermissibly retroactive. We express no opinion onthose questions.

8 The Court's decision produced three opinions. While six justices joined most of Justice Stevens' opinion, including the part applying AEDPA tothe Virginia Supreme Court's ruling, only four joined the part of the opinion interpreting AEDPA's S 2254(d). The Court's opinion on that issue was written by Justice O'Connor and joined by four other justices. Three justices dissented from the

result in an opinion by Chief Justice Rehnquist.

9 The approach creating such a division was endorsed by some decisions of this court and adopted by some of our sister circuits. See Baker v. City of Blaine, _____ F.3d _____ (9th Cir. 2000); Moore v. Calderon, 108 F.3d 261, 265 n.3 (9th Cir. 1997); Drinkard v. Johnson , 97 F.3d 751, 767-68 (5th Cir. 1996); Neelley v. Nagle, 138 F.3d 917, 924 (11th Cir. 1998). Those decisions are no longer good law.

10 This is so because the state court decision could be characterized either as having mistakenly treated a fact as material when in fact it was immaterial, or as having unreasonably applied prior precedent to the facts at issue.

11 While we, like Justice O'Connor, sometimes refer to "federal law" or "controlling law," rather than to clearly established federal law as determined by the Supreme Court, we do so only for ease of exposition. When we refer to the source of law binding on the state courts for purposes of our review under AEDPA, whatever the specific term we employ, we always intend that term to signify the statutory language.

12 Green v. French, 143 F.3d 865, 870 (4th Cir. 1998); Drinkard v. Johnson, 97 F.3d 751, 767-68 (5th Cir. 1996); Lindh v. Murphy, 96 F.3d 865, 870 (7th Cir. 1996) (en banc) rev'd on other grounds, 521 U.S. 320; Neelley v. Nagle, 138 F.3d 917, 924-25 (11th Cir. 1998). But see Hall v. Washington, 106 F.3d 742, 748 (7th Cir.

1997) (adopting a substantially different interpretation from that used by the earlier Seventh Circuit decision).

13 While one might have thought that the jurisprudence surrounding Teague v. Lane, 489 U.S. 288 (1989), could provide a useful analogy for construing AEDPA's requirements, the Williams majority stated that Teague provides little guidance for courts construing the "unreasonable application" prong of AEDPA. O'Connor at 3 (noting that Teague did not create a standard of review).

14 While the clear error doctrine has most often been applied to factual determinations, it is applicable to legal determinations as well. See, e.g., Calderon v. United States District Court, 151 F.3d 1225, 1226 (9th Cir. 1998) (applying clear error test for questions of law as part of mandamus determination); United States v. Cuddy, 147 F.3d 1111, 1114 (9th Cir.1998) (allowing departure from law of the case if prior decision was clearly erroneous); United States v. Navarro-Espinosa, 30 F.3d 1169, 1171 (9th Cir. 1994) (noting district court's power to correct clearly erroneous sentence within seven days).

15 The Supreme Court's adoption of the "objectively unreasonable" formulation provides further support for our holding in Duhaime that circuitcourt authority remains relevant under AEDPA. The "objectively unreasonable" standard had been adopted by the Third Circuit, which held that circuit court

precedent remained relevant to determine what constituted an unreasonable application under its test. Matteo , 171 F.3d at 889 (citing O'Brien). The Court's opinion endorsed this approach.

16 The Supreme Court implicitly affirmed this rule by acknowledging that a state court decision can be "contrary to " a Supreme Court case even when it involves different facts, as long as those facts are not materiallydistinguishable. That AEDPA does not require an on-point Supreme Court case for us to reverse also explains the Court's statement in Williams that the extension of Supreme Court precedent to a new area, or the failure to extend it to a new area, can constitute an unreasonable application of federal law. Williams, 120 S.Ct. at 1521. In addition, because the test for determining whether a particular application of federal law is unreasonable is an objective one, it should be clear that a state court's decision can be unreasonable even if it addresses a question not previously addressed by the Supreme Court or by the lower federal courts. This is also consistent with our law in the clear error context. In re Cement Antitrust Litigation, 688 F.2d at 1305 (holding that district court's ruling on matter of first impression can be clearly erroneous).

17 The method we adopt does not require that we render advisory opinions. As the Court's reasoning in County of Sacramento makes clear, we cannot make a determination that a decision is contrary to or involves an unreasonable application of clearly

established federal law without implicitly commenting upon what the state of the law is. County of Sacramento,523 U.S. at 841 n.5; see also Siegert v. Gilley , 500 U.S. 226, 232 (1991).

Given that we must necessarily resolve questions of federal law whenever we address a habeas petition under AEDPA, it behooves us to do so clearly and explicitly.

18 Although the prominent Supreme Court cases discussing suggestive processes have involved show-ups or single photographs, Biggers, 409 U.S. at 195; Brathwaite, 432 U.S. at 98, we have held that lineups can also be impermissibly suggestive, if the people in the lineup or the procedures employed at the lineup make it so. See, e.g., United States v. Field, 625 F.2d 862, 865 (9th Cir. 1980). The state court did not suggest that the standards governing suggestiveness should be different for lineups than for show-ups.

19 As Justice Stevens noted in Williams, when discussing "clearly established federal law" under AEDPA, rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule. As Justice Kennedy has explained: `If the rule . . . require a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.' 120 S.Ct. at 1507 (Stevens, J., concurring). Although the quotation here refers to

"new rules" in the context of Teague v. Lane, both the majorityand the concurrence in Williams agreed that, with one caveat, "clearly established law" under AEDPA is conceptually equivalent to an "old rule" under Teague. Id. at 1523 (O'Connor, J., for the Court); 1507 (Stevens, J., concurring). The caveat is that the source of clearly established federal law is limited to Supreme Court cases.

20 At oral argument the government referred to the fact that the police found a knife and a black jacket in Petitioner's car as further support for the existence of probable cause. However, Petitioner was arrested prior to the search of his car. Facts learned or evidence obtained as a result of an arrest cannot be used to support probable cause if those facts were not known to the officer at the moment the arrest was made. Wong Sun v.United States, 371 U.S. 471, 482 (1963); Allen v. City of Portland, 73 F.3d 232, 236 (9th Cir. 1995).

PROOF OF SERVICE

CASE NAME: *TUAN VAN TRAN V. GARY LINDSEY, WARDEN*
CASE NO.:

I DECLARE:

I am citizen of the United States and a resident of the County of San Diego, State of California. am over the age of 18 and not a party to the within action.

My business address is 1551 Fourth Avenue, #801, San Diego, California 92101-3156.

On AUGUST 11, 2000 I served the foregoing document described as:

APPENDIX
EXCERPTS OF RECORD

by placing the original and 40 copies to

UNITED STATES SUPREME COURT
1 FIRST STREET, N.E.
WASHINGTON, D.C. 20543

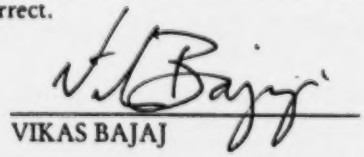
and 3 copies thereof in a separate envelope for each addressee named hereafter, and sealing each envelope and, with the postage thereon fully prepaid, depositing each in the United States mail at San Diego, California. Each enveloped was addressed to each such addressee respectively as follows:

ATTORNEY GENERAL OF STATE OF CALIFORNIA
Garrett Beaumont
Supervising Deputy Attorney General
P.O. Box 85266
San Diego, California 92186-5266

and one copy to
Mr. Tuan Van Tran, E-31757
Salinas Valley State Prison
D-3-127-Low
P.O. Box 1050
Soledad, Cal. 93960-1050

Executed on August 11, 2000 at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



VIKAS BAJAJ